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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [illegible] 1902.

No. [illegible] 55.

ANDREW W. SMYTHE, WILLIAM H. BYRNES, ADMINISTRATOR OF THE SUCCESSION OF EDWARD CONERY, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED APRIL 27, 1903.

(18,187.)

(18,137.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 308

ANDREW W. SMYTHE, WILLIAM H. BYRNES, ADMINISTRATOR OF THE SUCCESSION OF EDWARD CONERY, DECEASED, ET AL., PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a *Caption.*

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held in the court-room of said court, in the city of New Orleans, before the Honorable David D. Shelby, United States circuit judge for the fifth judicial circuit; the Honorable Wm. T. Newman, United States district judge for the northern district of Georgia, and the Honorable Harry T. Toulmin, United States district judge for the southern district of Alabama.

A. W. SMYTHE, Plaintiff in Error, }
vs.
UNITED STATES, Defendant in Error. }

Be it remembered that heretofore, to wit, on the 30th day of May, 1900, a transcript of the record from the circuit court of the United States for the eastern district of Louisiana was filed in the office of the clerk of said United States circuit court of appeals for the fifth circuit, in the words and figures following, to wit:

1 UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana, New Orleans Division.

ANDREW WOODS SMYTH, SUCCESSION OF EDWARD CONERY, and Succession and Heirs of David Chambers McCan (Deceased) *et al.*, Plaintiffs in Error, }
versus } No. 12329.
THE UNITED STATES OF AMERICA, Defendant in Error. }

Howe, Spencer & Cocke, Esquires, and Rouse & Grant, Esquires, for Succession of Conery & A. W. Smyth, plaintiffs in error.

E. Howard McCaleb, Esquire, for guardian of the minors McCan, plaintiffs in error.

F. B. Earhart, Esquire, special assistant U. S. attorney for defendant in error.

Writ of error to the United States circuit court, eastern district of Louisiana (New Orleans division), from the United States circuit court of appeals for the fifth circuit, returnable within 30 days from the 1st day of May, A. D. 1900, at the city of New Orleans, State of Louisiana.

TRANSCRIPT OF RECORD.

2 *Petition.*

United States Circuit Court, Eastern District of Louisiana, New Orleans Division.

UNITED STATES
versus
ANDREW WOODS SMYTHE, EDWARD CONERY, and SUC. and Heirs of David Chambers McCan (Deceased) *et al.* } No. 12329.

Filed August 7th, 1894.

To the honorable the judges of the circuit court of the United States for the fifth circuit and eastern district of Louisiana:

The petition of the United States of America, with respect shows:

That Andrew Woods Smyth and Edward Conery, — both residing and domiciliated in the city of New Orleans, State of Louisiana, in the said eastern district of Louisiana, together with the succession of David Chambers McCan and the succession of his widow in community, Mrs. Hester Calloway (both deceased) together also *of* their surviving heirs, the following-named minors, grandchildren of the said David Chambers McCan and his wife, Hester Calloway (both deceased)—who were the children of their son, Charles Patterson McCan (deceased), issue of his marriage with Mary Tobin, that said minor children and grandchildren of said David Chambers McCan are named respectively as follows:

Kate Elizabeth McCan, Fanny Tobin McCan, David Chambers McCan, Charles Patterson McCan.

That said David Chambers McCan, the grandfather of said minor children, died testate in the city of New Orleans aforesaid about the 27th day of July, A. D. 1893. That their said grandmother died testate July 1st, 1894, subsequently to the death of their said grandfather, and that their father, Charles Patterson McCan, died in the city of New Orleans on September 19th, 1886, and that their successions were opened respectively in the city of New Orleans, State of Louisiana, in the eastern district of Louisiana, and are numbered respectively, No. 39737, No. 43186 and No. 18811 of the docket of the civil district court of the State of Louisiana in and for the parish of Orleans, city of New Orleans, the domicile of said successions. That Harry H. Hall, Esq., residing and domiciliated in the said city of New Orleans and eastern district of Louisiana, has been duly appointed and
3 confirmed as testamentary executor of said David Chambers McCan and his wife, Hester Calloway (at the time of her death

widow in community of said David Chambers McCan). That Mrs. Mary F. Tobin, residing and domiciliated in the said city of New Orleans, Louisiana, in the eastern district of Louisiana, is the grandmother and legal tutrix of said above-named minor children, heirs and universal legatees of their said grandfather and grandmother *are*, as hereinafter set forth, justly and truly indebted together with the said Andrew Woods Smyth and Edward Conery, jointly and severally (*in solido*) to the said United States of America, in the full and just sum of twenty-five thousand dollars, lawful money of the United States, with interest at the rate of six per centum per annum from April first, eighteen hundred and ninety-three (April 1st, 1893), until paid—for this, to wit: That the said Andrew Woods Smyth was appointed pursuant to law by the President of the United States, superintendent of the mint of the United States at New Orleans, Louisiana, in the eastern district of Louisiana, for four years from the 20th day of December, anno Domini one thousand eight hundred and eighty-nine, and in due form of law, the President of the United States caused to be issued to said Andrew Woods Smyth, a commission as such superintendent of said United States mint at New Orleans, bearing date the 20th day of December, A. D. 1899. That the said Andrew Woods Smyth thereupon assumed the duties of said office, by virtue of said commission and continued to discharge the same until superceded by the Honorable Overton Cade on or about the 24th day of July, A. D. 1893.

Petitioners further represent, that by virtue of his, the said Andrew Woods Smyth's commission and appointment to said office, the said Andrew Woods Smyth, did make and execute, sign, seal and deliver in due form of law to petitioners at the city of New Orleans on the eighteenth day of March, A. D. eighteen hundred and ninety, the bond (a duly legally certified copy of which is hereto annexed, marked Exhibit "A," and made part hereof), in favor of the said United States, petitioners, in the full, just and penal sum of one hundred thousand dollars, lawful money, subject to the terms, conditions, covenants and obligations therein set forth and expressed; and the said Edward Conery and the said David Chambers McCan (of the city of New Orleans aforesaid and a resident domiciliated therein and who died testate in said city of New Orleans on or about the 27th day of July, A. D. 1893)—did then and there on the said 18th day of March, A. D. 1890, sign, seal, execute and deliver the
4 said bond together with the said Andrew Woods Smyth as his sureties therein, jointly and severally (*in solido*) for the faithful performance and compliance with the terms, conditions, covenants and obligations of the said bond by said Andrew Woods Smyth as superintendent of the said United States mint at New Orleans, aforesaid. Petition- further avers that the said Andrew Woods Smyth did wholly fail to comply with the terms and conditions of said bond, and particularly in this: That he did not faithfully and diligently perform, execute and discharge all and singular the duties of said office of superintendent of said mint of the United States at New Orleans aforesaid according to the laws of the United States; that he did not faithfully account for and pay over to the United

States of America, all balances of money by him received from petitioners, for disbursement in the line of his official duties and for gold and silver bullion received, purchased and coined by him in his official keeping, custody and control for the said United States, petitioners; that he did not faithfully account for and pay over to petitioners all moneys by him received and in his official custody for and on their account.

Now petitioners further show that the accounts, including the gold and silver bullion accounts of the said Andrew Woods Smyth, superintendent of said mint, with petitioners, have been duly examined, adjusted and stated by the proper accounting officers of the Treasury Department of the United States (including previous balances adjusted and stated as per report No. 297,556), commencing April 1st, 1893, and ending July 23rd, 1893; including statement and certificate of the first Comptroller of the Treasury thereon, as well as summaries of operations to June 30th, 1893, and July 24th, 1893, under said bond, and that a balance by said accounting officers was stated and found to be due petitioners by said Andrew Woods Smyth of twenty-five thousand dollars; all of which will more fully appear by reference to the First Auditor's report No. 299,997, dated January 10th, 1894, and all accounts annexed thereto, together with the certificate of the First Comptroller of the Treasury and two summaries of operations belonging thereto to June 30th, 1893, and July 24th, 1893, filed with said reports together with the certificates hereto of the Registry of the Treasury, which are all marked "Exhibits B" and are made part hereof, as if the same had been fully recited, set forth and written herein; the same being duly certified copies of the originals from the transcript, books and proceedings and the originals, on file in the Treasury Department of the United States at Washington, D. C., duly certified as such according to law. Petitioners further aver that a compliance has been had with the requirements of the act of Congress, approved August 8th, 1888 (25 Statutes at Large, p. 387), requiring the said above-named sureties on the said official bond of Andrew Woods Smyth to be notified of the default of their principal, the said Andrew Woods Smyth, superintendent of the mint of the United States, at New Orleans aforesaid. Petitioners now aver that by reason of the said breaches of the conditions of said bond, as herein set forth and averred the said bond has become forfeited and the obligations of the said obligors therein have become absolute.

Wherefore petitioners pray, that the said Andrew Woods Smyth, Edward Conery, Harry H. Hall, testamentary executor of the succession of David Chambers McCan (deceased) and testamentary executor of Mrs. Hester Calloway deceased, widow in community of said David Chambers McCan, and that said above-named minor grandchildren of the said David Chambers McCan, be duly cited through Mrs. Mary F. Tobin, the grandmother and the legal tutrix of the said minors, to answer this petition and after due legal proceedings had that said bond be declared forfeited, and that said defendants (including said defendant minor grandchildren, heirs and universal legatees of said David Chambers McCan, and said successions of said

David Chambers McCan and his deceased widow in community, Hester Calloway)—principal and sureties on said bond be condemned *in solido* to pay petitioners, The United States of America, the full and just sum of twenty-five thousand dollars, with six per cent. interest per annum from the first day of April, A. D. 1893, until paid with all costs of suit and for such other and further relief in the premises petitioner will ever pray.

(Signed) F. B. EARHART,
United States Attorney.

Citation to Andrew Woods Smyth.

Filed August 8th, 1894.

UNITED STATES OF AMERICA, }
Eastern District of Louisiana. }

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division.

UNITED STATES
vs.
ANDREW WOODS SMYTH, EDWARD CONERY, and SUC. AND Heirs of David Chambers McCan (Deceased) *et al.* } 12329.

6 The President of the United States of America to Andrew Woods Smyth, New Orleans, Louisiana, Greeting:

You are hereby summoned to comply with the demand contained in the petition of which a copy accompanies this citation, or to deliver your answer to the same in the office of the clerk of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in the city of New Orleans, in ten days after the service hereof, which delay is increased one day for every ten miles your place of residence is distant from New Orleans, the place where the court is held.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, at the city of New Orleans, this 8th day of August A. D. one thousant eight hundred and ninety-four and Independence of the United States of America, the 119th year.

Teste:
(Signed) E. R. HUNT, *Clerk*,
[SEAL.] By E. M. FULLER, *D'y Clerk.*

Marshal's Return on Citation.

Filed August 23d, 1894.

Received by U. S. marshal, New Orleans, La., Aug. 8, '94, and on the same day, month and year I served copy hereof and accompany-

ing petition on Andrew Woods Smyth, by handing same to him in person in the city of New Orleans, Louisiana.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOS. FABACHER, JR.,
Deputy U. S. Marshal.

Marshal's Return on Citation Issued to Edward Conery August 8th, 1894.

Filed August 23rd, 1894.

Received by U. S. marshal, New Orleans, La., Aug. 8, '94, and on the same day, month and year I served copy hereof and accompanying petition on Edward Conery, by handing the same to him in person in the city of New Orleans, La.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOS. FABACHER, JR.,
D'y U. S. Marshal.

Marshal's return on citation issued to Kate Elizabeth McCan, Fanny Tobin McCan, David Chambers McCan, Charles Patterson McCan, minor grandchildren of David Chambers McCan, through Mrs. Mary F. Tobin, grandmother and legal tutrix of said minors, New Orleans, Louisiana, August 8th, 1894.

Filed August 23rd, 1894.

7 Received by U. S. marshal, New Orleans, La., Aug. 8, '94, and on the 9th day of the same month and year I served copy hereof and accompanying petition on Kate Elizabeth McCan, Fannie Tobin McCann, David Chambers McCann, and Charles Patterson McCann, minor grandchildren of David Chambers McCann, by leaving the same at the domicile of their grandmother and legal tutrix, Mary F. Tobin, in the city of New Orleans, La., in the hands of Mary Devlin, a person apparently above the age of 14 years, at and residing at the domicile of said Mrs. Mary F. Tobin, grandmother and legal tutrix of said minors—she being absent from home at the time of said service—all of which facts I learned by interrogating said Mary Devlin.

(Signed) J. V. GUILLOTTE,
U. S. Marshal,
By JOS. FABACHER, JR.,
Deputy U. S. Marshal.

Marshal's return on citation issued August 8th, 1894, to Harry H. Hall, testamentary executor of the succession of David Chambers McCan (deceased) and testamentary executor of Mrs. Hester Calloway, deceased, widow in community of said David Chambers McCan.

Filed August 23rd, 1894.

Received by U. S. marshal, New Orleans, La., Aug. 8, '94, and on the 9th day of the same month and year I served copy hereof and accompanying petition on Harry H. Hall, testamentary executor of the succession of David Chambers McCan, dec'd, and testamentary executor of Mrs. Hester Calloway, dec'd, widow in community of said David Chambers McCan, by leaving the same at his domicile in the city of New Orleans, La., in the hands of Mary Siebert, a person apparently above the age of 14 years, at and residing at the domicile of said Harry H. Hall, testamentary executor as aforesaid, he being absent from home at the time of said service; all of which facts I learned by interrogating said Mary Siebert.

(Signed) J. V. GILLOTTE,
U. S. Marshal,
By JOS. FABACHER, JR.,
Deputy U. S. Marshal.

8 *Exception of Defendants of No Cause of Action.*

Filed December 3, 1894.

Circuit Court of the United States for the Fifth Circuit and Eastern Dist. of La.

UNITED STATES
vs.
ANDREW WOODS SMYTH ET AL. } No. 12329.

Exception of no cause of action.

To the honorable the judges of said court:

Now come defendants, for the purposes of this exception only and excepting to plaintiff's petition aver, that it discloses no cause of action against defendants or either of them, because defendant Smyth was not the actual custodian, either individually or as superintendent of the mint, of the money alleged to be due the plaintiff, nor was any portion of said money at any time actually in his possession. That other officers were specially charged by law with the care and actual custody of said money and were required by plaintiff to furnish bond, and did furnish bond for the faithful discharge of their duties, and said other officers had actual possession and control of said money and not the defendant Smyth.

Wherefore defendants pray that this exception be maintained and that plaintiff's petition be dismissed at its costs.

(Signed) GURLEY & MELLEN,
Att'ys for A. W. Smyth.
(Signed) ROUSE & GRANT,
W. W. HOWE,
Att'ys for E. Conery, Def't.
(Signed) DENEGRE & DENEGRE,
For Mrs. M. F. Tobin, Tutor, and H. H. Hall, Executor.

Case Heard on Exceptions, and Exceptions Referred to the Merits.

Extract from the Minutes, April Term, 1895.

NEW ORLEANS, SATURDAY, *June* 15, 1894.

Court met pursuant to adjournment.

9 Present: Hon. Charles Parlange, district judge; F. B. Earhart, U. S. attorney.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause came on to be heard upon the exceptions filed by defendants.

Gurley & Mellen appearing for A. W. Smyth; Rouse & Grant and Howe, Spencer & Cocke for E. Conery, exceptors.

F. B. Earhart, U. S. attorney, and James S. Easby-Smith, special assistant U. S. attorney, on behalf of the United States; and was argued by counsel, whereupon it was ordered that the said exception be referred to the merits.

Motion of F. B. Earhart, Special Assistant United States Attorney, Giving Notice to Defendants that Plaintiff Will Move Herein for Judgment by Default Unless Issue is Joined on or about Saturday, May 15, 1897.

Entered and Filed May 8, 1897.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
ANDREW W. SMYTH ET ALS. } No. 12329.

Now comes in open court The United States, plaintiff herein, by F. B. Earhart, special assistant United States attorney, and gives notice to defendants herein that the plaintiff herein will move for judgment by default in said cause unless issue is joined on same on or about Saturday, May 15th, 1897, at 11 o'clock a. m.

Marshal's Return on Motion.

Filed May 17th, 1897.

Received by U. S. marshal, New Orleans, La., May 14, '97, and on the same day I served a true copy of the within motion on the following-named person-, to wit: on Rouse & Grant, att'ys of record, p'ily on Wm. Grant; on Howe, Spencer & Cocke, of record; on J. Ward Gurley, Jr., of record, personally, who refused to accept service, stating that he is no longer attorney in the matter, and he refused to be served as such; on H. H. Hall, att'y of record, who refused to accept service on the grounds that he is no longer connected in the case, and he will not appear in the matter.

(Signed) J. V. GILLOTTE,
U. S. Marshal,
By JOHN EARLY.

Order: Defendants Allowed Until the Second Monday in June, 1897, to File Their Answers.

Extract from the Minutes, April Term, 1897.

NEW ORLEANS, SATURDAY, *May* 15, 1897.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause coming up this day upon the motion of F. B. Earhart, special assistant U. S. attorney, to enter a default against defendants, H. H. Hall being present in court stated that he was no longer the executor of the estate of D. C. McCan and did not represent said estate or appear therefor; whereupon E. H. McCaleb, Esq., also present in court, stated that he represented Mrs. Mary G. T. Stempel, guardian of the heirs of D. C. McCan, and would enter an appearance and file an answer for said defendant; W. W. Howe being present in court stated that he appeared with Mr. B. McCloskey, also here present, for the administrator of E. Conery, W. H. Byrnes, Esq. As to the remaining defendant, A. W. Smyth, Mr. Gurley being inquired of, stated that he did not represent Dr. Smyth in this particular case.

After the above proceedings it was ordered on motion of counsel that the defendants be allowed until the second Monday in June, 1897, time in which to file their answers.

11 *Answer of W. H. Byrnes, Adm'l'r E. Conery.*

Filed June 16th, 1897.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
ANDREW WOODS SMYTHE ET AL. } No. 12329.

Now into this honorable court comes William H. Byrnes, administrator of the succession of Edward Conery, deceased, one of the defendants in said cause, by his attorneys, and for answer to plaintiff's petition, denies generally, the allegations therein contained.

And further answering, this respondent alleges and avers, that the amount of $25,000, the alleged deficiency of Andrew Woods Smythe, on his official bond, as superintendent of the mint of the United States at New Orleans, Louisiana, herein sued for, was occasioned by a fortuitous event, to wit: a fire, in no way attributable to said superintendent, or his employés, which occurred in the vault of the cashier of said mint, between Saturday, June 24th, and Monday, June 26th, 1893, by and through which event the said sum in the currency of the United States, was *charged* (charred), burnt and destroyed, and the box containing the same was turned over to the agents and representative of the plaintiff for examination and investigation.

That the destruction of said currency having occurred by such fortuitous event, the said Andrew Woods Smythe, and the sureties on his official bond, are in no way liable, or responsible therefor, and said event is not covered by, or included within the terms and conditions of said official bond; all of which will more fully appear and at large, from the evidence which will be exhibited on the trial of this case.

Wherefore this respondent prays to be hence dismissed with costs, and for general relief.

(Signed) B. McCLOSKEY,
W. W. HOWE,
ROUSE & GRANT,
Attorneys for Defendant.

12 *Answer of Mrs. M. G. T. Stempel, Guardian of McCan Minors, Defendant.*

Filed June 16, 1897.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
ANDREW WOODS SMYTHE ET ALS. } No. 12329.

Now into this honorable court comes Mrs. Mary G. T. Stempel, wife of Edward Stempel, in her capacity as guardian of her minor

children, Kate Elizabeth McCan, Fanny Tobin McCan, David Chambers McCan and Charles Patterson McCan, and for answer to plaintiff's petition, denies generally the allegations therein contained.

And further answering, this respondent alleges and avers that the amount of the alleged deficiency of Andrew Woods Smythe, on his official bond as superintendent of the mint of the United States at New Orleans, Louisiana, herein sued for, was occasioned by a fortuitous event, to wit: a fire in no way attributable to said superintendent or his employés, which occurred in the vault of the cashier of said mint between Saturday, June 24th and Monday, June 26th, 1893, by and through which event the said amount herein sued for in the currency of the United States was charred, burnt and destroyed, and the box containing the same was subsequently turned over to and taken possession of by the agents and representatives of the plaintiff; that the destruction of said currency having occurred by said fortuitous event, the said Andrew Woods Smythe and the sureties on his official bond are in no way liable or responsible therefor, and said event is not covered by or included within the terms and conditions of said official bond—all of which will more fully appear from the evidence which will be adduced on the trial of this cause.

Wherefor-, this respondent prays to be hence dismissed with costs, and for general relief.

(Signed) E. HOWARD M'CALEB,
Attorney for Defendant.

13 *Answer of A. W. Smyth.*

Filed June 22, 1897.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
ANDREW WOODS SMYTH ET AL. } No. 12329.

Now into this honorable court comes Andrew Woods Smyth, one of the defendants in said cause, by his attorney, and for answer to plaintiff's petition, denies generally, the allegations therein contained.

And further answering, this respondent alleges and avers, that the amount of $25,000, the alleged deficiency of Andrew Woods Smythe, on his official bond, as superintendent of the mint of the United States, at New Orleans, Louisiana, herein sued for, was occasioned by a fortuitous event, to wit: a fire in no way attributable to said superintendent or his employés, which occurred in the vault of the cashier of said mint, between Saturday, June 24th and Monday, June 26th, 1893, by and through which event the said sum in the currency of the United States, was charred, burnt and destroyed,

and the box containing the same was turned over to the agents and representatives of the plaintiff for examination and investigation.

That the destruction of said currency having occurred by such fortuitous event, the said Andrew Woods Smyth and the sureties on his official bond are in no way liable, or responsible therefor, and said event is not covered by, or included within the terms and conditions of said official bond; all of which will more fully appear from the evidence which will be exhibited on the trial of this case.

Wherefore this respondent prays to be hence dismissed with costs, and for general relief.

(Signed) A. W. SMYTH,
Defendant in P. P.

Order of April 19, 1899, assigning cause for trial for Monday, May 29, 1899, at 11 o'clock a. m., on motion of F. B. Earhart, special U. S. attorney.

Order of Saturday, April 29, 1899, continuing case fixed for trial May 29, 1899, to Monday, June 5, 1899, at 11 o'clock a. m., by consent of counsel.

14 Order of June 1, 1899, continuing case to Monday, November 27, 1899, at 11 a. m., on motion of counsel for the defendant sureties.

Order of court of November 27, 1899, continuing cause from day to day until next Friday, Dec. 1, 1899, and discharging witnesses without further notice, by reason of an open jury case being on trial.

Order of November 28, 1899, continuing case until tomorrow at 11 a. m., for want of being reached.

Order of November 29, 1899, continuing case until Friday, Dec. 1, for want of being reached.

Order of Nov. 30, 1899, continuing case until Friday, Dec. 1, 1899.

Order of December 1, 1899, continuing case until Tuesday, Dec. 5, 1899, at 11 a. m., owing to pressure of other business before the court.

Case Called for Trial, Jury Empaneled, Hearing in Part, and Continuance.

Extract from the Minutes, November Term, 1899.

NEW ORLEANS, TUESDAY, *December* 5, 1889.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause was called for trial.

Present: F. B. Earhart, special U. S. attorney, for the United States; Howe, Spencer & Cocke, Rouse & Grant, for heirs of E. Conery, defendant; E. H. McCaleb for heirs of D. C. McCan.

Whereupon, the following-named jurors were called and sworn to well and truly try the issue joined herein, to wit:

15

1. Geo. H. Lord,
2. J. P. Glenn,
3. F. B. Nunn,
4. H. P. Cheval,
5. W. B. McCutchon,
6. Fred. Folger,
7. A. W. Nicholas,
8. H. E. Newald,
9. Emile Forster,
10. E. S. Ferguson,
11. T. Gachet,
12. A. L. Rivere.

When the court appointed Geo. H. Lord, foreman of the jury, and the trial was proceeded with.

After hearing pleadings and evidence and testimony in part it was ordered that the cause be continued until tomorrow at 11 a. m., for further hearing.

Case Resumed, Hearing of Further Evidence and Testimony, and Continuance.

Extract from the Minutes, Wednesday, December 6, 1899.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause as continued from yesterday, was this day resumed, and the counsel for the respective parties, as well as the jurors empaneled in the cause, being all present, the trial was proceeded with.

After hearing further evidence and testimony, it was ordered that the cause go over until tomorrow at 11 a. m.

Case Resumed, Hearing of Further Evidence and Testimony, and Continuance.

Extract from the Minutes, Thursday, December 7, 1899.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause as continued from yesterday was this day resumed and the counsel for the respective parties, as well as the jurors empaneled in the cause, being all present, the trial was proceeded with.

After hearing further evidence and testimony, it was ordered that the cause be continued to Monday, December 11, 1899, at 11 a. m., for further hearing.

16 *Case Resumed, Hearing of Further Testimony, and Continuance.*

Extract from the Minutes, Monday, December 11, 1899.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause as continued from last Thursday, was this day resumed, and the counsel for the respective parties, as well as the jurors empaneled in the cause being all present, the trial was proceeded with.

After hearing further testimony it was ordered that the cause be continued until tomorrow at 11 a. m.

Case Resumed, Hearing Further Evidence and Testimony, and Continuance.

Extract from the Minutes, Tuesday, December 12, 1899.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause, as continued from yesterday, was this day resumed and the counsel for the respective parties as well as the jurors empaneled in the cause being all present the trial was proceeded with.

After hearing further evidence and testimony it was ordered that the cause be continued until tomorrow at 11 a. m.

Case Resumed, Hearing of Further Evidence, Testimony, and Continuance.

Extract from the Minutes, Wednesday, December 13, 1899.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause as continued from yesterday was this day resumed and the counsel for the respective parties, as well as the jurors
17 empaneled in the cause, being all present, the trial was proceeded with.

After hearing further evidence and testimony it was ordered that the cause be continued until tomorrow at 11 a. m. for further hearing.

Case Resumed, Motion to Direct Verdict for Plaintiff, Granting of Motion, and Verdict.

Extract from the Minutes, November Term, 1899.

NEW ORLEANS, THURSDAY, *December* 14, 1899.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause as continued from yesterday, was this day resumed, counsel for the respective parties, as well as the jurors empaneled in the cause, being all present, thereupon counsel for United States, F. B. Earhart, special assistant U. S. attorney, moved that the court direct the jury to find a verdict for the plaintiff, The United States. Counsel for the defendants entered their objections. The court granted the motion of the U. S., and thereupon directed the jury to find a verdict for the plaintiff, The United States, counsel for defendants reserving a bill of exceptions to the ruling of the court.

The jury, after receiving the instructions of the court, did then and there, in open court, under the direction of the court, render and deliver the following verdict, to wit:

We, the jury, find a verdict for The United States of America, plaintiff, for the sum of twenty-five thousand dollars with six per cent. interest per annum from the first day of April, A. D. 1893, and against the defendant *in solido*, as prayed for.

GEO. H. LORD, *Foreman.*

Dec. 14, 1899.

And thereupon, it was ordered that the said verdict be recorded and it is done accordingly.

18 *Order: 30 Days Allowed Defendants After Rule for New Trial Shall Have Been Passed upon to Prepare, Present, and to Have Settled Bills of Exceptions.*

Extract from the Minutes, Thursday, December 14th, 1899.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

On motion of Wm. Grant, E. H. McCaleb and Howe, Spencer & Cocke, attorneys for defendants, it is ordered that the defendants do have a delay of 30 days after the motion for a new trial shall have been passed upon and overruled, within which to reduce to writing,

present and have settled their bills of exceptions noted on the record during the trial of this cause.

Order: Clerk of Court to Deliver Box Containing Charred Money to the Superintendent of the N. O. Mint, Who is Appointed Custodian of said Box.

United States Circuit Court, Eastern District of Louisiana.

Extract from the Minutes, November Term, 1899.

NEW ORLEANS, THURSDAY, *December* 14, 1899.

Court met pursuant to adjournment.
Present: Hon. Charles Parlange, district judge.

THE UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

The clerk stating that the safe in his office is not suitable for the safe keeping of the box of charred money offered in evidence in this cause, it is ordered, counsel for the U. S. and the defendants assenting, that the clerk deliver said box containing the charred money to the superintendent of the N. O. mint, who is hereby designated as custodian of said box, subject to the order of the court.

19 *Defendants' Bill of Exceptions No.* 1.

Filed April 20, 1900, as of date Dec. 14, 1899, *nunc pro tunc.*

United States Circuit Court, Eastern District of Louisiana.

THE UNITED STATES
vs.
ANDREW W. SMYTHE ET ALS. } No. 12329.

Be it remembered, that upon the trial of this cause before the court and a jury, the following and no other evidence was offered by the respective parties and given to the jury upon the issues presented by the pleadings:

(1.) The following-named witnesses were examined, and testified on behalf of the plaintiff, viz:

H. C. Stiers, Leonard Magruder, John C. Schulze, Joseph Firebaugh, Dr. Barrett, Overton Cade, C. W. Boothby, Frank C. Minor, Pat. Creagh, Frank Gee, G. F. Muegnier, W. S. Kennedy, Jules Stokey, Mrs. L. E. Rosenberg, Charles H. Moore, and their evidence was reduced to writing, and their depositions are hereto annexed and marked respectively Exhibit A 1 to A 15, inclusive, for identification and made part of this bill.

(2.) The plaintiff further offered and introduced the following documentary evidence:

The exhibits annexed to the plaintiff's petition, now marked respectively therein Exhibits A and B.

A copy of the notification to the sureties on the official bond of A. W. Smythe, marked Exhibit A 17, made part hereof.

The 3rd page of report of Mr. Steer marked Plaintiff 1, made part hereof.

A paper-writing marked Plaintiff's 2, made part hereof.

Documents marked p-3, p-4, p-5, p-6, p-7, p-8, p-9, which are also made part of this bill.

One document marked R 1 and R 2 made part hereof.

The plaintiff further produces in evidence before the jury, the following objects:

One lamp with oil and wicks.

One lamp chimney and broken lamp shade.

One bracket.

Some matches, burnt and unburnt.

One smoked basket and contents.

One charred wooden box.

One tin box unsoldered.

Paper boxes marked from 1 to 9, inclusive, stated by Mrs. Rosenberg, Government expert, to contain the charred and mutilated silver certificates and Treasury notes amounting to $1,182, all of which objects are made part of this bill, which are ordered sent up in the original to the court of appeals, along with the transcript of the record.

(2.) The following *witness* (witnesses) were examined and testified orally, or under commission on behalf of the defendant-, viz: James M. Dowling, Andrew W. Smythe and Duglas Burrell. And their respective depositions reduced to writing are hereto annexed, marked Exhibit D 1 to D 3, inclusive, for identification, and made part of this bill. And the respective parties here rested.

Thereupon the plaintiff, by F. B. Earhart, Esq., their special attorney, before the jury retired, submitted the following motion to the court:

"Mr. Earhart now moves the court that under the issues presented in this case, and the evidence, that the jury be directed to render a verdict for the plaintiff."

Thereupon the court, acting on said motion and after first refusing all the instructions asked for by the defendant-, gave the following directions to the jury: "I direct you that it is your duty in this case to find a verdict against the defendants as prayed for. The record will show that this verdict was reached by you under the direction of the court, and if the court makes an error in its so directing you, that error will be corrected by the appellate court."

To which ruling, instruction and direction to the jury, the defendants then and there, while the jury was still at the bar, and before the jury retired, duly excepted and still except, and tender this their bill of exceptions and pray that the same may be signed (and) sealed.

And the court directed that all of the evidence and testimony, oral and documentary, be incorporated in the bill of exceptions. The trial judge makes his written reasons for directing a verdict, part of this bill of exceptions and certifies that this bill of exceptions

was duly and seasonably presented to the court within the time previously and duly fixed by the court for presenting the same, and the trial judge orders this bill of exceptions and his said reasons to be filed *nunc pro tunc*, as of December 14th, A. D. 1899.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

21 *Defendants' Bill of Exceptions No. 2.*

Filed April 20, 1900, as of date Dec. 14th, 1899.

Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES
vs.
A. W. SMYTHE ET ALS. } No. 12329.

Be it remembered that upon the trial of this case before the court and the jury, the entire evidence in the cause being as shown by and incorporated in bill of exceptions No. one.

Thereupon the defendants, by their counsel, requested the court to charge the jury before it had retired for deliberation, as follows:

"If the jury believes from the evidence that the money representing the deficiency in the accounts of the defendant, A. W. Smythe, was stored in a vault provided by the United States for the safe keeping of the public funds in his custody, and that while so stored, the same was destroyed by fire, that such fire was accidental, and not caused by the fault or negligence of the said A. W. Smythe or the sureties on his official bond, then they will find a verdict for the defendants."

But the court refused to give said charge, to which refusal the defendants then and there, before the jury had retired, duly excepted, and still excepts, and tendered this, their bill of exceptions, and pray the court to sign and seal the same. The trial judge makes his written reasons for directing the verdict, part of this bill of exceptions and certifies that the same was duly and seasonably presented to him within the time duly and previously fixed by the court for presenting bills of exception- and the trial judge orders that this bill and said reasons be filed, *nunc pro tunc*, as of December 14, A. D. 1899.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Defendants' Bill of Exceptions No. 3.

Filed April 20, 1900, as of date Dec. 14, 1899.

Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES
vs.
A. W. SMYTHE ET ALS. } No. 12329.

22 Be it remembered that upon the trial of this case before the court and a jury, the entire evidence in this cause being

as shown by and as incorporated in bill of exceptions No. one, the defendant requested the court to give the following charge to the jury:

"If the jury believe from the evidence that the alleged deficiency of $25,000 was contained in the bank box in said vault in the form of paper currency, to wit: United States Treasury notes, and that all of said money was destroyed by fire while so contained in said vault, and that the remnants and debris thereof were delivered by Smythe to the proper representatives of the United States Government, who were authorized to receive it, then I charge you that under the evidence the Government has not suffered any substantial damages by the destruction of its own obligations, and your verdict, if in favor of the plaintiffs, can in no event exceed nominal damages."

But the court refused to give the said charge, to which refusal the defendants then and there, while the jury was still at the bar, and before they had retired, duly excepted, and still excepts, and tender this their bill of exceptions, and pray the court to allow and sign and seal the same according to law, which is now done by the court. The trial judge makes his written reasons for directing the verdict as part of this bill of exceptions and certifies that the same was duly and seasonably presented to him within the time duly and previously fixed by the court for presenting bills of exceptions and the trial judge orders this bill and said reasons to be filed *nunc pro tunc* as of December 14, A. D. 1899.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Defendants' Bill of Exceptions No. 4.

Filed April 20, 1900, as of date Dec. 14, 1899, *nunc pro tunc.*

Circuit Court of the United States, Eastern District of Louisiana.

UNITED STATES
vs.
A. W. SMYTHE ET ALS. } No. 12329.

Be it remembered that upon the trial of this case, the entire evidence in this cause being as shown by and as incorporated in and made part of bill of exceptions No. one.

Whereupon the defendants, by their counsel, requested the court to charge the jury as follows:

23 "The court having refused the other charges asked for, and without any waiver whatever, the defendants ask the court to charge the jury to give credit to the defendants for all the money identified and turned over to the United States."

But the court refused to give this charge, to which refusal, the defendants then and there, while the jury was still at the bar and before it had retired, duly excepted, and tendered this, their bill, and pray that the same may be allowed, signed and sealed according to law, which is now done by the court.

The trial judge makes his written reasons for directing a verdict, part of this bill of exceptions and certifies that the same was duly and seasonably presented to him within the time previously and duly fixed by the court for presenting bills of exceptions and the trial judge orders this bill and said reasons to be filed *nunc pro tunc* as of December 14, A. D. 1899.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Reasons for Directing Verdict.

Filed April 20, 1900, as of date December 14, 1899, *nunc pro tunc.* Referred to in and made part of bills of exception- Nos. 1, 2, 3, and 4.

U. S. Circuit Court, East. Dist. La.

UNITED STATES
vs.
A. W. SMYTHE ET AL. } No. 12329.

Reasons of trial judge for directing a verdict made part of each and every one of defendants' bills of exceptions.

The condition of Dr. Smythe's bond as superintendent of the U. S. mint at New Orleans, is that he "shall faithfully and diligently perform, execute and discharge all and singular the duties of said office according to the laws of the United States."

U. S. Rev. Stats., sec. 3506, provided, "that the superintendent of each mint shall receive and safely keep until legally withdrawn all moneys or bullion which shall be for the use or the expenses of the mint."

It may be well to also have in mind Rev. Stats., sec. 3501, providing that superintendent- of mints shall give bond, with one or more sureties, "for the faithful and diligent performance of the duties" of their office; also providing that "similar bonds
24 may be required of the assistants or clerks, in such sums as the superintendent shall determine with the approbation of the Director of the Mint; but the same shall not be construed to relieve the superintendent or other officers from liability to the United States for acts, omissions or negligence of their subordinates or employés."

Rev. Stats. sec. 3500 provides that every officer of the mint shall take an oath faithfully and diligently to perform the duties thereof.

Rev. Stats. sec. 3503 provides that "the superintendent of each mint shall have the control thereof, the superintendence of the officets (officers) and persons employed therein and the supervision of the business thereof, subject to the approval of the Directors of the Mint."

Rev. Stats. sec. 3504 provides for certain accounts to be rendered and certain statements to be made by the superintendent and for the appointment by him of assistants, clerks and workmen.

It is perfectly clear that the Federal courts have uniformly held

that on such a bond as Dr. Smythe's the officer is virtually an insurer and cannot be relieved even against an unavoidable loss, except only when the loss occurs by an act of God or of the public enemy and without any neglect or fault on the part of the officer.

Of course, in the present cause, the loss was not unavoidable. Nay, more, it would seem to have been caused by the fault of persons for whom Dr. Smythe was responsible. But even if in this cause the loss had been shown to have resulted from an accidental or unavoidable cause (no act of God or of the public enemy being involved), Dr. Smythe would still be liable under the clear and uniformly concordant decisions of the Federal courts. The motives of high public policy which require that U. S. custodians of public moneys be held to a strict accountability are well stated by Mr. Justice McLean in U. S. *vs.* Prescott, 3 How., p. 578, and by Mr. Justice Strong in Bevans *vs.* U. S., 13 Wall., p. 62.

So stringent is this accountability that the Supreme Court in U. S. *vs.* Thomas, 15 Wall., p. 337, seem to have experienced difficulty in relieving a custodian of U. S. moneys from whom they had been taken by the Confederate forces, without fault or neglect on his part.

Three of the justices dissented and Mr. Justice Miller, who was one of them, called attention to the fact that Congress had, recognizing the former decisions of the Supreme Court on the subject, enacted a law to provide in certain cases of great hardship, for the relief of custodians of public moneys who lose them without fault or neglect on either part. See Rev. Stats., sec. 1062. Notice also act of May 9, 1888, 25 Stats., 135, allowing the Postmaster General to investigate certain losses by postmasters, occurring without fault on the part of the postmasters. Such statutes, negative of course the idea (but the matter is absolutely clear without them) that in the absence of such statutes, the officers could be relieved. Not long prior to the Thomas case the Supreme Court had held in Bevans *vs.* U. S., 13 Wall., 56, that an officer from whom the Confederate forces had forcibly taken public moneys would not be relieved because he was at fault, such fault being that by not promptly paying over the moneys, he had exposed them to the seizure.

See U. S. *vs.* Dashiel, 4 Wall., p. 182; U. S. *vs.* Prescott, 3 How., p. 578; Boyden *vs.* U. S., 13 Wall., p. 17, in which loss by fire is mentioned); U. S. *vs.* Thomas, 15 Wall., p. 337; U. S. *vs.* Freeman, 1 Wood. and Min., p. 45; U. S. *vs.* Keeler, 9 Wall., p. 83; Bosbyshell *vs.* U. S., C. C. A., 77 F. R., p. 944, affirming 73 F. R., 616; Ency. of Law (1st ed'n), *verbo*, "Bonds," vol. 2, pages 446 1, p. 446*m* and notes, p. 467*b*; Ency. of Law (2d ed'n), *verbo*, "Bonds," vol. 4, 4, p. 695 and notes, p. 679, 680, and 681.

The warehouseman is held only to the exercise of due care. He is in no manner an insurer, and if the goods entrusted to him are lost, he is relieved, if the exercise of due care on his part is shown. Ency. of Law (1st ed'n), *verbo*, "Warehouseman," vol. 28, p. 642.

After the evidence in the cause was closed, there was absolutely nothing for the jury unless the liability of Dr. Smythe was to be

held to be merely that of a warehouseman. Of course, the trial judge could not take such a view of the law without disregarding totally all the Federal adjudications on the subject. Even if Dr. Smythe had been a mere warehouseman, it is doubtful, to say the least, whether a trial court would have been justified under the evidence in this cause, in allowing a verdict in favor of the defendants to stand. The Government furnished a new and improved fireproof steel vault to Dr. Smythe, with a smaller vault on the inside and yet his subordinates without reason or justification placed within the larger vault a box containing inflammable material and then laid the currency on that box.

Would even a warehouseman be excused under such circumstances?

The court was urged to charge the jury that if they found that the
$25,000 were contained in the bank box in the form of U. S.
26 Treasury notes and that all said moneys were destroyed by
fire and that the remnants and debris of the moneys were turned over to the Government, that then the Government suffered no damages by the destruction of its own obligations, &c.

This requested charge ignored the elementary distinction between obligations to indemnify and obligations to do specific things.

As against the latter obligations, the plea *non est damnificatus* does not avail.

It is of course beyond all questions, that the bond sued on was an obligation to perform certain duties, to do certain things. It does not admit of doubt that it was the duty of Dr. Smythe to safely keep and to deliver to the Government or his successor the $25,000 in dispute. That his bond was not merely an obligation to pay the moneys but to safely keep and deliver them as received, results plainly from the authorities above cited.

Specially notice language of Mr. Justice Bradley in U. S. *vs.* Thomas, *supr.;* Bosbyshell *vs.* U. S. (C. C. A.), *supra;* Ency. of Law (2d ed'n), *verba*, "Bonds," vol. 4, pp. 694 & 695, and notes also *idem.*, p. 681 and notes; Ency. of Law (1st ed'n), *verba*, "Bonds," vol. 2, pp. 446 1 and 466*m* and notes, and 467*b;* Ency. of Prac. & Plead., *verbo*, "Bonds," vol. 3, p. 663.

Notice Johnson *vs.* Risk, 137 U. S., p. 308; Mills *vs.* Dow, 133 U. S., p. 431; Wicker *vs.* Hoppock, 6 Wall., p. 94; U. S. *vs.* Gleason, 20 Sup. Ct. Rep., p. 233 (Jan. 8, 1900).

Specially notice language of Mr. Justice Swayne in Wicker *vs.* Hoppock, 6 Wall., on page 99.

Surely an obligation to safely keep $25,000 of the public moneys, which obligation clearly implies a safe delivery of it, cannot be satisfied by the turning over to the Government of a box full of ashes claimed to be the remnants of the moneys and if it were the law that such an issue must be submitted to a jury, an easy way may be contrived to escape the strict accountability to which all the Federal authorities hold custodians of public moneys.

As Mr. Justice McLean said in U. S. *vs.* Prescott, *supra:* "Public policy requires that every depository of public moneys should be held to a strict accountability. Not only that he should exercise the

highest degree of vigilence, but that '*he should safely keep*' (italics of the court) the moneys which come to his hands. Any relaxation of this condition would open a door to frauds which might be practiced with impunity. A depository would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part." So, as to the contention here
27 made, if a custodian of public moneys may in lieu of the moneys produce ashes and assert that the moneys were U. S. Treasury notes and were burnt, and this should be a legal defence, then in practice it would almost always prevail because in the nature of the matter, it would in nearly all cases, be impossible for the Government to overcome the testimony of the officer. In this cause, Dr. Smythe is estopped from raising the question whether the United States are damnified when U. S. Treasury notes are destroyed by fire. To hold him, it is sufficient to say that he has violated the obligation of his bond to safely keep and deliver those notes which were unquestionably "moneys" of the United States.

The futility of the contention on this point was exposed when Dr. Smythe's counsel were driven in argument to admit that under their view of the matter, no civil responsibility whatever would attach to any one for the destruction of the U. S. Treasury notes by an officer charged by law with their safe custody and delivery.

The trial court was urged to charge the jury to give credit for the $1,182 which the Government expert testified was the aggregate of all the moneys burned.

Defendants were no more entitled to a credit for these $1,182 than they were entitled to a credit of $25,000 if the jury had been allowed to find and had found that $25,000 were burned.

It may be that if the defendants pay the judgment and thereupon obtain the ashes from the Government, that they may redeem the $1,182 as any other person could do under similar circumstances. Or it may be that they could have relief through the Court of Claims (Rev. Stats., sec. 1062). But with those questions, this court has no concern.

The plea that it would be a great hardship to condemn Dr. Smythe and his bondsmen in this cause, can be easily answered.

If the loss occurred through any wrong-doing or negligence on the part of any of Dr. Smythe's subordinates, then it would be nothing but plain, ordinary justice that Dr. Smythe and his bondsmen should make the loss good. If the loss occurred from any accidental fire, then Dr. Smythe and his bondsmen are held to have known the law at the time Dr. Smythe accepted the office of superintendent of the mint. No one is compelled to accept an office and one accepting an office takes it *cum onere*. Dr. Smythe and his bondsmen are held to have known that under the uniform decisions of the Federal courts, a loss of the moneys by an accidental fire would fall
28 upon them and not upon the Government and that therefore the Government need not insure against fire. Dr. Smythe could easily have protected himself against the wrong-doing of his subordinates by requiring bonds of them, and against fire by insuring. As to the costs of insuring, it was for him to decide before

accepting the office whether the emolument or salary of the office warranted him in taking insurance, if he wanted protection by insurance.

It may be of interest to notice U. S. Rev. Stats., sec. 951, as to requirements in pleading credits or set-offs against the Government. Also on this point, see Thomas *vs.* U. S., 15 Wall., p. 346; Ency. of Law (1st ed'n), vol. 2, *verbo*, "Bonds," p. 466*p*. Of course in this cause there was no claim or proof that any claim for credit or set-off was ever presented to the proper department and rejected.

In this cause there has been no charge or intimation that Dr. Smythe was personally at fault or blameable in any way. Such fault or negligence as may have been shown in the cause is attributable to his subordinates and in no manner to him.

The trial judge hereby makes the foregoing reasons part of each and every one of the bills of exceptions and orders, said reasons to be filed *nunc pro tunc* as of December 14th, A. D. 1899.

(Signed) CHARLES PARLANGE, *U. S. Judge.*

Stenographic Report of the Testimony and Evidence.

Filed December 21, 1899, and refered to in and made part of bills of exceptions.

United States Circuit Court, Eastern District of Louisiana.

THE UNITED STATES
vs.
ANDREW W. SMYTHE ET AL. } No. 12329.

NEW ORLEANS, LA., *December 5th*, 1899.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury.

Present: F. B. Earhart, Esqr., special assistant United States attorney, for the plaintiff.

Rouse & Grant and Howe, Spencer & Cocke, Esqrs., for W. H. Byrnes, administrator, and the heirs of Edward Conery.

E. H. McCaleb, Esqr., for Mrs. Stemple, administratrix, and the heirs of D. Chester McCan.

29 The pleadings having been read, Mr. Earhart on behalf of the United States offers in evidence the exhibits annexed to the plaintiff's petition, embracing the bond sued on, statements of United States Treasury balances, showing deficiency. A & B.

Mr. McCaleb for the defendants, Heirs of D. C. McCan reads to the jury the Exhibit B, offered by the plaintiff.

Mr. Earhart next offers the notification to the sureties on the bond of A. W. Smythe addressed to each of them by mail by the Treasury officers. A 17.

He also offers the commission of A. W. Smythe, by way of certified copy under the act of Congress. Ste. A & B.

A 1. H. C. STEIRS, sworn on behalf of the United States, says:

By Mr. EARHART:

Q. What is your official position?

A. A clerk in the office of the Treasury Department, Washington, D. C.

Q. Did you visit the city of New Orleans in 1893?

A. Yes, sir.

Q. In what capacity?

A. I was sent here as the representative of the Treasury Department, from the office of the Director of the Mint, to witness the settlement between the operative officers of the mint and the superintendent of the mint, and I weighed the bullion and counted the coin and seeing to all moneys called for by the books of the mint belonging to the United States were present and on hand.

Q. Is that the only purpose for which you were sent here?

A. And to witness the transfer to the incoming superintendent.

Q. Did you visit New Orleans previous to that occasion in any official capacity?

A. I think I was here, I am not certain when. I made many settlements at the different mints and assay offices.

Q. How long previous to the time you came and made this general count; I want to know did you ever visit the mint here to investigate a fire?

A. No, sir; that was not the purpose of my visiting here. I remember now that I had made settlements here on prior occasions.

Q. Did you make the count or an investigation of the mint in 1893?

A. Yes, sir.

Q. By which it was ascertained there was a deficit of $25,000?

A. Yes, sir.

Q. Have you got your report upon that investigation?

A. Yes, sir.

30 Q. Will you please produce that report and file it?

A. Yes, sir.

Witness produces the report called for.

Q. State whether you counted this money mentioned in this report which you produce. State if the facts stated in this report are true. Did you come here, take this money, weigh and count it and find a deficit?

A. I came to New Orleans to witness the settlement between the operative officers of the mint and the superintendent; I counted the money and weighed the bullion in the mint, and *see* if the amount of moneys belonging to the Government, required by the books of the mint, were on hand.

Q. Then you made a report of your doings?

A. I entered on my duties on July 1st, 1893, and made my count.

Q. And this paper is the report?

A. This is the official report of what I did.

Q. Did you count this money in the mint?

A. I weighed all the bullion and counted every cent of that money myself. Of course, I had an assistant appointed by the Director of the Mint, Mr. Leonard Magruder of New Orleans. Mr. Shulze represented Dr. Smythe and Mr. Welch represented Mr. Overton Cade; but I weighed every ounce of bullion in the mint and counted every dollar, having the assistance of these gentlemen; but at no time, did I in any manner lose sight of the fact that I was here at the direction of the Secretary of the Treasury, and the Director of the Mint, to weigh the bullion and count the money.

Q. Now, before you counted it, did you ascertain what amount of money was due the Government of the United States, from the books of the mint?

A. Yes, sir; I ascertained from the books of the mint what was the amount of money claimed by the books, as on hand. I have that here.

Q. What was the amount due the Government?

A. I cannot remember. The total balance called for by the books of the mint, on the 30th day of June, 1893, was 16,185,498.17.

Q. Now, did you verify that as accounting officer by official information gotten from the subtreasuries of the United States?

A. Yes, sir; I got from the subtreasury here in New Orleans and in New York the balances that were held by these insti-
31 tutions to the credit of the New Orleans mint; and these balances, with the balances in the mint, constituted the total balance in the mint.

Q. That is, up to June 30th, 1893?

A. Yes, sir.

Q. After you had made this count and ascertained the balance, both by the books of the mint and the information you ha dfrom the subtreasuries, did you find, after the count was made, a balance——

A. Yes, sir.

Q. Or a deficit?

A. I found both a balance and a deficit, I found in the mint by actual count on the 30th of June, 1893, $16,160,498.17, showing a deficit or a shortage of $25,000.

Q. Now, repeat again, the names of the gentlemen that made this count.

A. Mr. Shultze was representing the superintendent Dr. Smyth, Mr. Welch was representing Mr. Cade, the incoming superintendent. I should say further, that Mr. Dowling was with me from time to time, but these were the men specially commissioned to assist me in making the count, Mr. Magruder, was my assistant; Mr. Walch was representing Mr. Cade, and Mr. Schultze was representing Dr. Smyth.

Q. When you made this count, who was superintendent of the mint?

A. Dr. A. W. Smyth was superintendent of the mint at that time, until the time that I transferred the mint and its contents to Overton Cade.

Q. Then that is the report made by you to the department; that paper there?

A. Yes, sir.

Q. And that report verifies your oral statement?

A. Yes, sir.

Mr. McCaleb for the heirs of D. C. McCan objects to the last page of the report made by the witness, inasmuch as it speaks of "waste of bullion," which expression might embarrass the jury.

Mr. EARHART: There are no special averments in the petition, pointing to any particular species of money. The witness testifies that he counted the money and weighed the bullion ounce by ounce and that he discovered a deficit of $25,000.

The COURT: I do not know the theory upon which the Government is proceeding here in the introduction of its evidence. I do not know whether the Government is anticipating the defense, or trying to meet the defense in advance.

Here are these accounts that have been introduced without objection, to prove *prima facie* deficit and what the purpose of the
32 testimony now is, I do not know. I do not know what the purpose of the Government is. In addition to that, here is a witness on the stand, and it is attempted to introduce some report made by him. There is objection made, that there — some extraneous matters in this report which ought to be excluded.

Mr. EARHART: If that report is correct it goes in as record evidence; if not, it will not go in at all. I put this witness on the stand, however, to prove that he actually counted the money. The burden of proof upon this issue of deficit, is upon the Government.

The COURT: And the Government has met that issue by introducing the records of the department. If the defendants contradict that report, you (Mr. Earhart) can come back in rebuttal.

Mr. Earhart, for the United States, now offers in evidence the report testified to by the witness as having been made by him. And the court only admits at this time, the third page of the report, which page is marked "Pl'ff I."

WITNESS: I will read this report (third page), as follows:

"The bullion and moneys were weighed and counted; the bullion amounts were found, viz: Gold bullion, $36 487, '855 ounces, valued at $678,844.32. Silver bullion, ounces is 443,665'32, value, $6,704,178.57. Gold coin, $751,841.91. Silver coin, $7,621,463.61. United States Treasury notes, including balances of assistant treasuries, at New York and New Orleans, $403,520.59. Ordinary expenses, $501.21; for refining, etc., $147.96. Making a total of $16,160,498.17 b., showing a deficit or shortage of $25,000.

By the COURT:

Q. The net result of all these figures, so far as this case is concerned, is you found a deficit of $25,000?

A. Yes, sir; showing a deficit or shortage of $25,000, represented by some charred currency, which the cashier claims was burned by

fire in his vault between Saturday, June 24th, and Monday, June 26th, 1893. I did not attempt to ascertain the value of the burned money, but turned it over to Dr. Barrett and Mrs. Rosenberg.

By Mr. EARHART:

Q. In making that last report, the cashier simply claimed that after you made this count, you found this deficit of $25,000; did you make any demand for that deficit?

A. Yes, sir.

Q. On whom?

A. On the cashier of the mint, Mr. Dowling.

Q. Was he there?

A. Yes, sir.

33 Q. What did he say?

A. Well, I could not find the $25,000, it was short. I found that much short in my count, after having counted up the entire mint, and he said that amount was represented by this charred currency.

Q. Did you ever find that $25,000?

A. No, sir; that stands as a deficiency or shortage.

Q. With this explanation?

A. That stands as a deficit or shortage, the amount due the United States by Dr. A. W. Smyth, and so carried on the books of the Treasury Department; and by my account here or rather the account of the Treasury Department, with Dr. A. W. Smyth.

Q. Did you subsequently make the transfer of the mint to Mr. Overton Cade, Dr. Smyth's successor?

A. Yes, sir.

Q. When was that?

A. That was on July 24th, 1893; Mr. Cade entered upon his duties as superintendent then.

Q. Have you got these accounts, too?

A. Yes, sir; I have both, these original accounts here, and my own memorandum.

Mr. EARHART: The copies not having been received of the accounts from the Treasury Department under certification, other copies will now be used until the originals arrive.

WITNESS: Here is the opening account of Overton Cade, as superintendent of the mint, with the Treasury Department and also his own account.

By Mr. GRANT:

—. Is that then included in these exhibits, these general accounts? I mean the copies?

A. Yes, sir; they are.

Q. Are they not included in the exhibit annexed to the petition?

A. Yes, sir.

By Mr. EARHART:

Q. When the transfer was made from Dr. Smyth to Overton Cade,

I notice the papers to show that deficit, and that Overton Cade gave such a receipt to Dr. Smyth.

A. No, sir; the general account of Dr. Smyth is here, but not the account of Overton Cade.

Mr. McCaleb, for the heirs of McCan, asks why the report or statement of account of Overton Cade is introduced.

Mr. EARHART: When one superintendent succeeds another, the incoming superintendent gives a receipt for what he receives, to his predecessor, or the amount he turns over, and in this instance he gave a receipt showing there is a deficit of $25,000, and the Government wishes to prove that this receipt was given, subject to this deficit.

34 The COURT: I suppose it is meant that they wished to show that Dr. Smyth turned over to Mr. Cade, the whole amount of money in the mint, that the mint owed, less this $25,000?

Mr. MCCALEB: And that this deficit has been carried forward in the accounts of the Government.

The COURT: I do not know what the idea of the Government is. It is not certain that it will ever be denied in this case that there was a deficit of $25,000. The books of the Treasury absolutely prove that, that there was a deficit of $25,000.

Mr. MCCALEB: The point we make is this: that the account of Mr. Cade is not evidence against Dr. Smyth. I do not see any receipt ever given by Overton Cade to Dr. Smyth. It is a mere count, or statement offered in evidence, and also one signed by the successor of Cade. The copy cannot bind the defendants here in any way. The Government has proved that there is a deficiency and it is for the defendants to account for it.

Mr. EARHART: It is a general denial here. Dr. Smyth kept books of the bullion, as superintendent of the mint, and when he retired from the superintendency of the mint, he turned his books and money and everything over to his successor. He turned over, according to his books the money counted by the examiner.

Mr. McCaleb withdraws his objection.

Q. Have you the receipt that Overton Cade gave to Dr. Smyth, his predecessor?

A. Yes, sir; I have.

Q. Please select from these papers, the last report of Dr. Smyth.

A. Yes, sir; here it is.

Q. I notice here in this report which has been admitted that there is a balance in the subtreasuries of New York and New Orleans to the credit of Dr. Smyth of how much?

A. $403,520.59.

Q. Will you please look at the last account of Dr. Smythe, read what the account is there signed by Smythe?

A. I have an account here forming a part of the papers, showing a balance on Monday, 30th day of June, signed by Dr. Smythe, superintendent, in which he has the Treasury note account of $428,520.59.

Q. What is the date of that account?

A. These are the balances on the 30th of June, 1893.

The paper referred to by the witness is marked P. 2.

Q. Now, look at that whole account of Dr. Smythe, and
35 see if there is any mention made there, and if there is, point it out to us, of any shortage or deficit of $25,000.

A. There is not. There is a balance here in what is termed the Treasury note account, admitted by Dr. Smythe of $428,520.59, admitted as due to the United States by Dr. Smythe.

Q. You counted that money?

A. Yes, sir.

Q. That is the last account Dr. Smythe made to the Government?

A. Well, that is the balance on the 30th of June, that is the count made here, that goes up to the date of the transfer, but there are no differences in the balances, the balances are the same.

Q. That is his last fiscal-year account?

A. Yes, sir.

Q. And it was not until you counted according to this document P. 1, that you found the actual deficit of $25,000?

A. I counted this Treasury note account to find the balance there, as I had previously found in the other account here and instead of $428,520.59, I found it only $403,520.59.

Dr. Smythe, in all of his accounts admitting $428,520.59, as the balance due from him to the United States.

Q. And in the subsequent account also?

A. In all the accounts of Dr. Smythe.

Q. Turn to that account and mark it with a letter.

A. Yes, sir. It agrees absolutely with this statement, the Treasury Department statement. This is the account of July 24th, 1892, the date of the transfer.

Q. That is when he went out of office?

A. Yes, sir, the account is up to July 24th, 1893. The time when he went out of office and Mr. Cade took possession.

Q. Does he include the $25,000 in the account of Treasury notes?

A. Certainly.

Q. He never has excluded it?

A. No, sir; never, always $428,520.59, as due the United States by him.

Q. And you never ascertained the deficit until you counted?

A. No, sir, I counted $428,520.59, and found $403,520.59.

Q. Then the last report made by Dr. Smythe to the United States, was the report in which he included in his Treasury note account this $25,000 as due the Government?

A. Yes, sir, I was going to say that that agrees absolutely with the Treasury Department.

Q. Does it not agree with Dr. Smythe's account?

A. Certainly, Dr. Smythe never changes his statement that he is responsible to the United States for $428,520.59. That includes the deficit. The Treasury Department makes up a statement
36 which agrees with Dr. Smythe's, that he owes $428,520.59 and therefore when we gave Dr. Smythe credit for the

amount transferred to Overton Cade, we still held Dr. Smythe as owing the Government $25,000, in accordance with his own statements, and it so stands on the books of the Treasury Department today.

The document which the witness was directed to mark by letter is now marked P 3.

Cross-examined by Mr. McCaleb:

Q. Where is this account, is there any mention made of burned money?
A. In which account?
Q. In Dr. Smythe's account.
A. There is no mention made of it.
Q. In these accounts, before you, is no mention made of it?
A. Not by Dr. Smythe.
Q. Then by whom?
A. In the accounts proper, there was no mention of burned money at all.
Q. Where is it mentioned in the papers before you?
A. In the receipt given by Mr. Cade to Dr. Smythe. Whoever drew up that receipt makes this entry, "Less burned money, 25,000."
Q. What became of that burned money?
A. What became of it?
Q. Yes, was it not delivered over to the officers of the Government?
A. No, sir, I know nothing about burned money; I cannot recognize burned money but charred money in Dr. Smythe's account.
Q. You stated there was burned money exhibited to you, at the time you made this count?
A. Yes, sir, I said that when I called for the $25,000 balance, I was told that was represented here by this charred money.
Q. You do not know what become of that?
A. Do you mean the part, or these charred notes?
Q. Yes.
A. They are in the mint today, some of them are.
Q. They were turned over to the possession of the Government?

Mr. Earhart objects to the above as not competent evidence.

Mr. McCaleb: The witness stated in his examination-in-chief, that while he was making this count, a box or package of charred money was exhibited to him which he did not count. I now ask him what become of it and what was done with it.

37 A. Well that package of charred money is in possession of the Government.

By Mr. Grant:

Q. You found $403,520.59, in currency?
A. I found, $403,520.59 in the United States Treasury note count.
Q. Not burned?

A. Well, it was actual money, and balances at the assistant treasuries at New York and New Orleans.

Q. You have stated that the cashier, or Dr. Smythe, tendered a box claiming that it contained $25,000 of burned money, in discharge of his liability?

A. Well, he claims that the shortage as I found, was represented in this burned money, or charred money.

Q. And the charred money has been received by the United States and is in possession of the United States today?

A. It is in the custody of the United States mint.

By Mr. EARHART:

Q. How do you know it is in the custody of the Government? Do you know whether it was turned over to the superintendent of the mint, or the Government of the United States?

A. Well, I know that it is held there at the mint.

Q. Do you know who the burned money and debris were turned over to, whether to the Government of the United States or to the superintendent of the mint?

A. Well, I do not know just how to answer that question; it is held in the custody of the mint now.

Q. Do you know who received it, whether it was the superintendent of the mint, or some other officer of the Government?

A. I cannot tell you that.

Q. Then you do not know anything about it?

A. Perhaps not.

Mr. McCaleb here reads the report marked Exhibit "B" to the witness, showing the deficit or shortage of $25,000, represented by some charred currency, which the cashier claims was burned in a fire, which occurred in his vault on Saturday, June 24th, and Monday, June 26th, 1893, and that the witness did not attempt to ascertain the value of this currency, but turned it over to Dr. Barrett and Mrs. Rosenberg.

Q. This Dr. Barrett and Mrs. Rosenberg, were they not representatives or officers of the United States?

A. They were here for the Government.

Q. And in the receipt by Overton Cade dated July, 1893, I see again, "Less burned money $25,000." That is the same amount previously referred to, is it not?

38 A. Yes sir, they characterize it in that way; I know the amount deciphered is in that burned money.

By Mr. EARHART:

Q. Did they get this money after examination, or was it turned over to them as officers of the Government for investigation.

A. For examination and investigation.

Q. After they got through with it to whom was it delivered?

A. I do not know; I know the amount deciphered is burned money.

Q. Do you know whether it was delivered to Dr. Smythe or Overton Cade?

A. I do not know, it was turned over to them to investigate it.

Q. You do not know what became of the money, after it left the custody of the experts?

A. No, sir.

Q. Do you know where it is now?

A. I know as a matter of general knowledge where it is.

Q. But officially, do you know whether it is in the custody of the United States, through any officer?

A. No, sir.

Q. Do you know in whose custody that burned money has been put, after the experts had examined it?

A. I do not know of my own knowledge where it is, that is, actual knowledge. Of course, I have general knowledge.

Q. Did you have anything to do with the transfer?

A. Not with that money, no sir. I know what was deciphered out of these charred notes.

Q. And therefore as a matter of fact, you do not know to whom this money was delivered of your own personal knowledge?

A. No, sir. It was not of my duty to follow that money, or the amount that he claims.

Q. When you say that it was turned over to the Government of the United States, you have made that statement without any personal knowledge of the fact, either personal or official?

A. I simply mean, that it was turned over then to Dr. Barrett and Mrs. Rosenberg, for their examination and investigation.

Q. But what became of it subsequently, you do not know?

A. No sir, not from any personal knowledge.

By Mr. McCaleb:

Q. There were two accounts offered by the Government before recess, are they before you?

A. They are Superintendent Cade's accounts.

39 Q. These two accounts I refer to were signed by an officer of the Treasury?

A. They are Mr. Cade's opening accounts, showing the balances he received from Dr. Smythe.

Q. Will you please look at this paragraph, "Quarter ending September 30th, 1893, signed R. M. Walshe, acting superintendent," and this indorsement, "Bureau of the Mint, January 29th, 1894." These accounts have been examined and approved, signed by Preston, director?

A. Yes, sir, September 30th, 1893.

Q. Does not this amount (deficiency burned money) figure in this account?

A. No, sir.

Q. Look at it and see.

A. It does not form any of the balance in this mint.

Q. But it is not accounted for, for that amount, signed by these Government offices?

A. Well, they have made an entry here of all the balances, due from them to the Government, in which they designate this money as deficiency, or burned money, but the Government cannot be responsible for what they wrote.

Q. Does it not appear by the entry on that account, offered in evidence by the Government, that this deficiency "burned money $25,000" figures as one of the items?

A. No, sir, not of the balances.

Q. I do not ask you about the balances. Was it not figured in the accounts?

A. Well, it figures in the account. I see on this sheet of paper the item, "deficiency, burned money," but it does not enter into the account. The balance as shown by Mr. Cade on September 30th, excludes this $25,000.

Q. Does not that account appear to be checked off?

A. Yes, sir; I there notice $25,000.

Q. You say it is checked off?

A. It is checked off by some one, but not by the auditor of the Treasury Department.

Q. By whom was that document signed?

A. R. M. Walshe, acting superintendent.

Q. Acting superintendent of what?

A. Of the New Orleans mint.

Q. And to the left it is signed by whom?

A. R. E. Preston, Director of the Mint at Washington.

Q. That account has been approved by the mint authorities at Washington?

A. The account has, but the $25,000 has not.

Q. Well, I speak of the paper.

A. Yes, sir, that paper has been approved, the account summary in which appears the balances due from Overton Cade to the
40 United States on September 30th, 1893, nowhere mentions the $25,000. I assert that as an absolute fact. And upon that the Treasury account is stated. I can give you that statement here. I have the original paper.

Q. You did not make that paper?

A. No, sir.

Q. You never signed it?

A. No, sir, I could not sign it, because I did not represent the New Orleans mint, but the United States Treasury Department. I have my Treasury statement to correspond with that, which I made.

By the COURT:

Q. State again if there is any mention upon this paper, which you are now examining, of the burned money; what is that statement?

A. That statement is supplemental of the balances due by him, simply for the convenience of the New Orleans mint. It is to designate that money only with the records. The balances are comprised in other statements, recognized by Mr. Cade, in which there is no mention of it whatever.

By Mr. SPENCER:

Q. But it is a statement purporting to have been made by Mr. Cade's assistant?

A. Yes, sir.

Q. And approved by the authorities at Washington?

A. Yes, sir; that is approved, but they do not approve the $25,000 as any part of the monies.

A 2. LEONARD MAGRUDER, sworn on behalf of the United States, says:

By Mr. EARHART:

Q. At the count that was made on the occasion of the transfer of the mint by the superintendent, Dr. Smythe, to Mr. Cade, were you one of the counters?

A. Yes, sir.

Q. Whom did you represent?

A. I assisted Mr. Styer, in representing the Mint Bureau at Washington.

Q. You saw the amounts called for by the accounts of the Treasury Department and by the books of Dr. Smythe at the time?

A. Yes, sir.

Q. Did you see the amounts called for by the Treasury Department?

A. Yes, sir.

Q. After you were through with the counts, state whether from the amount you found on the books of Dr. Smythe and of the Treasury Department and the subtreasury there was a balance or a deficit.

A. There was a deficit.

Q. How much was the deficit?

A. $25,000.

41 Q. You handed that to Mr. Cade?

A. Yes, sir.

Q. And made the transfer subject to that deficit?

A. Yes, sir.

Cross-examined by Mr. MCCALEB:

Q. You found as an actual fact there were $403,520.59, in the Treasury note account?

A. I do not remember the exact form it was in.

Q. You found a deficit of $25,000?

A. Yes, sir; in currency.

Q. What was there exhibited, or displayed to you, as representing this deficit?

A. There was nothing, at least we saw nothing.

Q. Did you see any burned or charred money there?

A. We saw no burned or charred money, no, sir. That was turned over to other parties, we had nothing to do with that.

Q. Did you see it?

A. Yes, sir; I saw it, I saw the box.
Q. The box said to contain that?
A. Yes, sir; said to contain that amount.
Q. It was turned over to what parties?
A. To the experts from Washington, Dr. Barrett and Mrs. Rosenburg.

By Mr. EARHART:

Q. At the time you were making this count, you saw all that?
A. No, sir; that was claimed to be turned over, we had nothing to do with it.
Q. You made a statement that you saw the box there, and that it was turned over to the experts, we are talking of the time you made the count?
A. Yes, sir.

By Mr. MCCALEB:

Q. You say that you saw the box said to contain charred money, is that a fact?
A. Yes, sir.
Q. And that this charred money represented this deficit of $25,000?
A. It was claimed to represent it.
Q. And this box containing this charred or burned money was turned over to the representatives of the United States Treasury Department, who were out here for that purpose?
A. Yes, sir.
Q. That is all you know about it, you never examined this charred money?
A. No, sir.
Q. Was it an open or a sealed box?
A. It was an ordinary bank box.

By the COURT:

Q. A metal box?
A. Yes, sir.

42 By Mr. MCCALEB:

Q. In whose possession was that box the last time you saw it?
A. It was in the mint building.
Q. I know, but in the possession of whom?
A. In the possession of the superintendent, I presume he was the custodian.
Q. Was it not in the possession of this lady, Mrs. Rosenburg, and Dr. Barrett?
A. No, sir; I never saw it going into their possession, it was just left there. I never saw it after I saw it once, the first time.

By Mr. EARHART:

Q. You commenced this count about the 1st of July?
A. I do not remember the exact date, I think it was.

Q. At the time that you made this count, was it not a fact, that this burned money, or debris, was in the possession of Dr. Smythe in one of his vaults?

A. Yes, sir.

Q. That is a fact?

A. Yes, sir.

Q. And when Dr. Smythe turned it over to anybody, he turned it over to Dr. Barrett and Mrs. Rosenburg the experts, is not that a fact?

A. Well, we left it there in the vault where we saw it; I never was in and out of that vault.

Q. You have no knowledge of his turning it over to anybody officially?

A. No, sir; I have not.

Q. You did not see any delivery of it?

A. No, sir; never anything more.

Q. All that you have stated on the stand, is what you have gleaned from hearsay?

A. Yes, sir; well generally.

A 3. JOHN C. SHULZE, sworn for the United States, says:

By Mr. EARHART:

Q. You were present with Mr. Magruder at the time about which the transfer was made by Superintendent Smythe to Overton Cade?

A. Yes, sir.

Q. You represented, I believe, Overton Cade?

A. No, sir; Dr. Smythe.

Q. You counted all the bullion and money in currency, silver and everything of that kind?

A. Yes, sir.

Q. That was called for by the books of Dr. Smythe and the accounts of the Government?

A. Yes, sir.

43 Q. After you counted it, did you find all the money there?

A. No, sir.

Q. What did you find?

A. I found a shortage of $25,000.

Q. After you found the shortage, the transfer was then made to Mr. Cade?

A. Yes, sir; to Mr. Cade.

Q. You do not know, of your own personal knowledge, anything about the shortage?

A. No, sir.

Q. All you know is that you counted it and that is the amount of shortage?

A. At the time I counted it I found that the account was that much short.

Q. And so reported when the transfer was made?

A. Yes, sir.

Q. When the transfer was made, it was made with that deficiency?

A. Yes, sir.

Cross-examined by Mr. McCaleb:

Q. What kind of money did you count there?

A. We counted gold, silver and currency, and I suppose nickles and coppers.

Q. Did you see any charred or burned money there?

A. Not at that time.

Q. When did you see it?

A. I saw it here when Captain Cade turned the mint over to Captain Boothby, the box was then opened, that was the first time I saw the money.

Q. When was that?

A. I believe in the latter part of July or the beginning of August, 1898.

Q. Was this charred money in the box, you say?

A. Yes, sir.

Q. And was still in the mint at the termination of Mr. Cade's term, on the advent of Mr. Boothby, the present superintendent of the mint?

A. Yes, sir.

Q. Was the box sealed, or was it opened?

A. It was sealed and opened.

Q. The seals were broken?

A. Yes, sir.

Q. By whom were the seals broken?

A. I do not remember now, I came in there. I think Captain Boothby was present and Mr. Cade, I forget the other gentlemen that were present.

Q. These seals were broken in the presence of whom?

A. I did not see the seals broken, I saw the box opened.

Q. The seals had already been broken, and the box opened exhibited to you, in 1898, when the mint was turned over to
44 Captain Boothby, by Mr. Overton Cade, his predecessor in office?

A. I do not understand you.

Q. It was turned over by Mr. Cade, the predecessor in office to Captain Boothby, his successor?

A. Yes, sir; I think Captain Boothby receipted for the box.

Q. Captain Boothby is the present superintendent of the mint?

A. Yes, sir.

A 4. Joseph Firebaugh, sworn for the United States, says:

By Mr. Earhart:

Q. Did you make the count, on the transfer from Superintendent Cade to Superintendent Boothby?

A. I represented the Mint Bureau, in merely checking off the bullion and counting the coin.

Q. Did you make a written report of that count?

A. I probably wrote a letter.

Q. You do not know whether you made a written report?

A. I have no doubt but what I did, that was a part of my duty.

Q. In making that count, did you compare it with the books of the mint?

A. It was supposed to be made from the books of the mint. The books called for so much bullion in the hands of the melter and refiner, and so much coin and currency to pass from the custody of one superintendent to that of the other. And the Mint Bureau instructed me to note, that these amounts were found and report to them, and the receipts were passed in due form.

Q. When you made that count, was there any deficiency?

A. So far as the figures given were taken from the books, and given to me, they checked out all according to the books. But after the count there was an alleged deficit box of $25,000, which my instructions had said nothing about, and the transfer of which I witnessed from the outgoing superintendent to the incoming superintendent. I saw merely the alleged box, containing the remnant of whatever there was there.

Mr. Earhart offeres in evidence decuments marked P 4 and P 5.

Q. Then all your business there was to count?

A. Yes, sir.

Q. You do not know anything about the facts connected
45 with this case, except you counted that money?

A. I do not quite understand you.

Q. I say that your business was an accountant, representing the Government?

A. Simply. They recited it in the simplest terms to me. Your duty will merely be to check the amounts.

Q. You saw these two accounts that Mr. Spencer had?

A. Yes, sir.

H. C. STIERS, recalled for the United States, says, after identifying documents: P-6, P-7, P-8 and P-9, are the open accounts of Mr. Boothby, superintendent of the New Orleans mint.

Doctor BARRETT, sworn for the United States, says:

By Mr. EARHART:

Q. You were sent here to the United States mint to make an investigation as I understand it, as to a fire that took place there, or were you sent to some other place?

A. Yes, sir; I was sent here.

Q. For what purpose were you sent here?

A. I was sent here to investigate the cause of a fire at the mint at New Orleans.

Q. Did you find any property in the possession of the superintendent of the mint, which you required for that investigation?
A. Yes, sir.
Q. Who was the then superintendent of the mint?
A. Mr. A. W. Smythe.
Q. Did you make the investigation?
A. I did.
Q. After you made the investigation, what did you do with that property?
A. I locked it up in vault 6.
Q. To whom did you deliver it?
A. I did not deliver it to anybody, I took possession of it.
Q. I know, but after you got through with the investigation, what did you do with that property?
A. I locked it up in vault 6.
Q. Did you put it into anybody's custody?
A. No, sir; I took the custody of it myself, I kept the combination of the vault myself.
Q. Did you ever take a receipt for it from anybody?
A. Not at that time.
Q. How long was it kept in vault No. 6?
A. Until December, 1893.
46 Q. Then after that what happened?
A. It was then taken out and used on the trial.
Q. Taken out to be used on a criminal trial?
A. Yes, sir.
Q. The trial of Mr. Dowling?
A. Yes, sir; the trial of Mr. Dowling, the cashier.
Q. After you got through with the trial, what did you do?
A. I turned it over to the superintendent of the mint and took his receipt for it.

Mr. Earhart offers in evidence the receipt given to the witness by the superintendent of the mint.

Mr. McCaleb for the defendant objects to the offer as *res inter alios acta*. The defendants are not bound by any receipt that anybody may have given.

Q. Can you remember what you turned over to Overton Cade, the superintendent of the mint?
A. I can remember some of the things.

Mr. McCaleb objects to the above on the ground that the defendants had nothing to do with this matter. The witness states that after a criminal trial he delivered this box and contents to Mr. Cade and took his receipt.

Mr. EARHART: When other witnesses were on the stand, the question was asked them, Did you not see this burned money turned over to the United States. Now, I propose to show that it was turned over to the superintendents of the mint and their successors.

Q. Can you remember from memory all the items of this property in evidence that you took during the trial of Mr. Dowling?

A. I remember a great many of them. I think I have a memorandum of them in my pocket.

By Mr. SPENCER:

Q. When was that memorandum made?

A. I think it was made recently from my own memorandum. This document I made to refresh my memory.

By Mr. EARHART:

Q. You took a receipt from the outgoing superintendent, Mr. Cade?

A. Yes, sir; I turned that over to the department.

Q. Have you got a copy of that?

A. No, sir; I have not. I turned it over to the department.

Q. Could you get your original receipt?

A. I do not know, unless the department was telegraphed to.

47 Cross-examined by Mr. MCCALEB:

Q. Your statement is, it is (—) possession of the Treasury Department at Washington?

A. When I took it I turned it over to the Treasury Department at Washington. I- was not my own matter and I turned it over to them. Of course, I remember a great many things from memory, but I have one list in my pocket that was made at the time. That is the list of the burned or charred money, I made that at the time.

By Mr. EARHART:

Q. Do you know what time that was?

A. July, 1893.

Q. When you turned it over to Overton Cade?

A. No, sir; that was on January 4th, 1894, but this list I made was made out in July, 1893, at the time this burned money was examined.

Q. You received it from Doctor Smythe?

A. Yes, sir.

Q. To use all this evidence and property?

A. Yes, sir.

Q. You got it from Dr. Smythe to use it in a criminal trial?

A. Yes, sir.

Q. And after the trial you turned it back to the superintendent of the mint, who was Overton Cade?

A. Yes, sir.

Q. And would not that receipt from Overton Cade to you of this property, give a list of this property?

A. I have not got the receipt, the receipt is on file in Washington, I suppose.

Q. Have you got a list of the property you turned over to Mr. Cade?

A. I do not know, I think it is on the receipt that I turned over

to the department. I have a list of the burned money, but not a list of the other things.

Adjourned.

NEW ORLEANS, LA., *December 6th*, 1899.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury and all of counsel present.

A 4. Doctor BARRETT, recalled for the United States, says:

By Mr. EARHART:

Q. You were on the stand when court adjourned yesterday?

A. Yes, sir.

48 Q. When you turned the burned money over to Overton Cade, superintendent of the mint, did you take a receipt for it?

A. Yes, sir; I did.

Q. Did you turn anything else over to him besides the burned money?

A. Yes, sir.

Q. What?

A. All the exhibits of which I had the custody, that had been used on the trial.

Q. You mean the criminal trial?

A. Yes, sir; in December, 1893, and January, 1894.

Q. Then you say you took a receipt from him?

A. Yes, sir; I did, from Mr. Cade.

Q. And you sent that receipt to Washington?

A. Yes, sir.

Q. You took that receipt for this property?

A. I took the receipt for the property. Yes, sir.

Q. And you say you took it from Overton Cade?

A. Yes, sir; from Mr. Overton Cade.

Q. Then, as a matter of fact you never had possession of this property, excepting for the purposes you have stated?

A. That is all. I simply had it in my custody from the time I took hold of it there in the mint office, the day it was shown to me, up to the time at which I took my receipt from Mr. Cade for it, simply to be used in that case.

Q. To be used in the criminal trial of Mr. Dowling?

A. Yes, sir.

A 5. OVERTON CADE, sworn for the United States, says:

By Mr. EARHART:

Q. You were the superintendent of the New Orleans mint?

A. Yes, sir.

Q. You succeeded Dr. A. W. Smyth, as superintendent?

A. Yes, sir.

Q. Do you know Dr. Barrett?

A. Yes, sir.

Q. Do you remember on January 4th, 1894, giving him a receipt for the packages and property that was used in the Dowling trial?

A. Giving him a receipt for them; yes, sir.

Q. Have you that original receipt?

A. No, sir; I have a list of them, but I have it not with me, only the list of the burned money.

Q. Was it not put in your letter book; would you know your signature in your letter book?

A. Yes, sir.

Q. It has been testified that the original receipt was sent to Washington?

A. Yes, sir.

Q. See if that letter book was your letter book when you were superintendent.

A. Yes, sir; that is my letter book.

49 Q. Is that a letter-press copy of the receipt given by you, as superintendent of the mint to Dr. Barrett?

A. Yes, sir; it is a copy of the receipt given to Dr. Barrett.

Q. By you, Overton Cade, superintendent of the mint, to Dr. Barrett?

A. Yes, sir.

Q. Of the property therein contained?

A. Yes, sir.

Q. Do you remember writing me a letter when I made a demand, as special assistant United States attorney in this case, for a copy of that receipt with your signature and your letter to me on that subject?

A. Yes, sir; it is here.

Q. Look at the whole letter?

A. Yes, sir; that is a copy of the receipt given Dr. Barrett.

Q. Is that the same as the original in that book?

A. Yes, sir; it is just the same in the letter book, as it is in the original.

Mr. Earhart, for the United States, offers the receipt spoken of and identified by the witness.

Mr. Grant objects. The defendants do not object so much to the authentication of the receipt as to the receipt itself. The evidence already adduced shows that Dr. Barrett received this box, containing burned, charred and defaced currency; that when he had finished the purpose for which he held the box, he turned it over to Mr. Cade. All that is proper proof enough, but it is attempted now by this receipt to show the contents of that box; for the receipt is not taken for that box, but for certain specific things, which we do not know were contained in the box or not. Moreover, the receipt is dated January, 1894. It is a document passing between two persons with whom we have no privity, who are not authorized to bind us by any statement whatever. The witness can state he received the box of burned money, if he did receive it from Dr. Barrett, but not to go further. The main objection upon which we have the right to have the receipt excluded is because it is *res inter*

alios acta. It is an attempt to prove by a receipt a particular fact, which can only be proved by witnesses facing the jury.

Mr. SPENCER: This receipt was given to Dr. Barrett, not while Dr. Smyth had any connection whatever, or any control over this box, but Dr. Barrett took possession of this box immediately after the fire, and kept possession of it until the following January, or until a time long afterwards, when it was produced for us in a criminal trial. It was used on that trial and then Dr. Barrett turned it over to Mr. Overton Cade, after he had no further use for it, and he took a receipt for it. That was long after Dr. Smyth's connection with the mint had ceased, and the passing of this receipt has no connection whatever to Dr. Smyth, and it is *res inter alios acta.*

The COURT: For the court to make a proper ruling, I think it is necessary for the attorney of the Government to explain to the court, what the course of the Government is in this case; what the Government is trying to do. Here is a suit by the Government on an official bond. The Government does not say anything about burned money, or anything else, but simply says that Dr. Smyth, superintendent of the mint, gave a bond; that he failed to account for $25,000, and it wants judgment against his sureties for that amount of money. I never knew of a suit on an official bond to anticipate any defense that might be made to it. I have always understood that the Treasury transcripts make proof of the liability, until further proof is needed. If these Treasury statements were not contradicted, they would be sufficient to found a verdict upon against the sureties. The Government wishes to supplement the Treasury evidence, while it could have waited and seen whether there was any attack made upon them, and have rebutted the attack, if necessary. But at all events, the Government has gone on and offered proof that the count of the money actually took place, thus bolstering up these Treasury statements. In addition to that, the Government goes into this question of burned money, over which Dr. Smyth had no control. I thought it would have been the defendants that would have been looking around for this burned money; it is a little anomalous. What is the course of the Government?

Mr. EARHART: At no time, either directly or indirectly, the slightest intention of going into the matter of proof of the fortuitous event set up by the defendants. The witness Dr. Barrett was placed on the stand by the Government for the simple purpose of showing, that this property which is claimed in the defendant's answer to be in possession of the Government of the United States, has not been in their possession, but that it has never left the custody of the superintendents of the mint from Dr. Smyth down to and including Mr. Boothby. That is what the Government proposes to prove by Dr. Barrett.

The COURT: Then you are trying to meet a defense before it is made?

Mr. EARHART: No, your honor, I put in the exhibits for the Government and I put witnesses on the stand to prove the count.

While they testified, mention has been made of burned money. If such a thing exists, as burned money, that money is not in the possession of the Government, and we are not through with our proof yet as to Dr. Smyth.

51 The COURT: Is it a material issue as to whether this money is in the custody of the Government or not? Does that cut any figure in the case?

Mr. EARHART: Yes; the defendants wanted to show it yesterday. They attempted by the witnesses on examination to show that this money has been turned over to the Government of the United States, whereas it never left the custody of the superintendents. Dr. Barrett testified that he got it for a short time to be used, and that then it was turned over to Overton Cade and passed from Cade to Boothby. The Government has never deprived the superintendent of any possession yet. I propose to prove by reason of the peculiar character of this count that this deficit all the way through is a deficit of the superintendent of the mint. That deficit has never been increased or decreased in any way beyond the evidence on the exhibit, and *that* none of this property or money has ever been used.

The COURT: Are you any better off than if you had sued upon your Treasury transcript? Suppose you simply put in that Treasury transcript; why, then, all the proof up to this time, what can it amount to?

Mr. EARHART: It settles the question of the custody of the money. If the Government had gotten $25,000 from Dr. Smyth, no matter how it had gotten it, then there would be no case. But I am trying to show that is no such thing, but that there is an actual deficit by reason of the counts here and the accounts of the Treasury Department.

Mr. MCCALEB: The evidence so far introduced shows that when they have gotten this money, which never has been counted—when they got to this money they stopped, and it went into the possession of certain Government experts.

The COURT: What went into the hands of experts?

Mr. MCCALEB: The burned money. Look at the last item of this account which the Government has filed yesterday.

The COURT: Yes; "deficiency, burned money." That is the reason I asked Mr. Earhart what is the condition of the case, and why he should have spoken of burned money at all, but rested his case there.

Mr. GRANT: The district attorney and ourselves agreed that the Treasury transcript of the accounts of Dr. Smyth are not evidence *per se* in regard to matters in a mint. By some peculiar provision of the statute these Treasury accounts are of no value to show the liability of the defendants, therefore we had to rely upon a count and produced the people who made it. We state it is not a complete count, because Mr. Styer said he stopped and did not

52 count the burned money. I do not mean to say he could have counted burned money, except the officer having knowledge of that fact; but the count introduced by the district attorney

shows that the $25,000 is burned money; that the Government has taken it up and carried it all along as a balance, and it has been approved by the authorities at Washington.

The COURT: What, then, is the particular objection to these papers?

Mr. GRANT: My objection is that it is attempting to prove a fact which can be established by living witnesses, which has been established by living witnesses, that this box of mutilated money was delivered to Dr. Barrett and by Mr. Barrett to Mr. Cade.

Mr. EARHART: The exhibits come from Dr. Smyth, and Dr. Smyth's administration show- no count of any burned money, and there is no evidence showing that the $25,000 was ever burned. Other superintendents than Dr. Smyth have made records of burned money, but no evidence by the Government itself is offered to show there were $25,000 burned. I propose to prove by this witness that this property is still retained by the superintendent of the mint.

Mr. EARHART (to witness):

Q. Can you remember what Dr. Barrett turned over to you?

A. Yes, sir. There was a package of burned money. They were in several packages, or several numbers.

By the COURT:

Q. In what condition were these packages that you refer to as packages of burned money?

A. They were pasted on paper.

Q. Could the money be recognized?

A. I do not remember that, whether it could be recognized or not, it has been so long ago.

Q. Where is that burned money, as you call it?

A. I turned it over to Superintendent Boothby when I transferred the property of the mint to him, and took a receipt from him.

Q. You did then transfer all the burned money that you had received from your predecessor to your successor?

A. Yes, sir.

By Mr. EARHART:

Q. Then, besides, there were other things?

A. Yes, sir; there was a wooden box and a tin box.

53 Q. Did you ever look inside these boxes?

A. Yes, sir; I did, the one that Dr. Barrett turned over to me; I had to see what I was receipting for.

Q. When you were superseded in the mint, whom did you turn it over to?

A. To my successor, Mr. Boothby.

Q. Did you check it off with Dr. Barrett when it was turned over to you?

A. Yes, sir; it was checked.

Q. And the burned money?
A. Yes, sir.

By Mr. McCaleb:

Q. You say that this money was pasted?
A. Yes, sir; some of it was pasted on paper.
Q. Who pasted it on paper?
A. Mrs. Rosenberg.
Q. Who is Mrs. Rosenberg?
A. Mrs. Rosenberg is a lady that works in the "burned-money department of the Treasury Department."
Q. At Washington?
A. Yes, sir; at Washington.
Q. In what condition was this money; was it in a box?
A. You mean the charred money?
Q. Yes.
A. No, sir; it was in packages.
Q. Not in a box?
A. No, sir.
Q. In what condition was it when it was exhibited to you?
A. Well, it was pretty well burned up. You mean the money?
Q. Yes.
A. Well, the money was pretty well burned up.
Q. Was some of it burned more than others?
A. Yes, sir.
Q. Were any ashes delivered to you?
A. No, sir; not that I remember.
Q. Was any of it burned so much as to disfigure it, so you could not tell what it was?
A. Yes, sir.
Q. Were the bills disfigured so much that by looking at the bills, you could not tell the amount of them?
A. No, sir; I could not tell.
Q. When did that burned money first come into your possession?
A. It came into my possession some time in January of 1894; I do not remember the date.
Q. Did you afterwards part with the possession of it temporarily?
A. No, sir; it was in my possession until Captain Boothby succeeded me.
Q. Was there any trial going on here on the occasion of which you turned it over to somebody?
54 A. No, sir. It never was out of my possession, until I turned it over to Captain Boothby.
Q. What safe was it in in the mint?
A. It was in a vault in the mint; the wooden box, the tin box and the papers and things were in a vault in the basement. The burned money was in a box sealed by Dr. Barrett and myself in my private vault; the superintendent's vault.
Q. Testimony has been given here, about this burned money having been used in evidence on some trial?
A. Well, that is prior to the time I received it.

Q. Whom did you get it from?
A. I received it from Dr. Barrett.
Q. Who is Dr. Barrett? Is he a United States Government expert?
A. Yes, sir.
Q. He is in the "burned-money department" also?
A. I do not know.
Q. Do you know where that money was, from June, 1893, to January, 1894, when it was turned over to you?
A. Do I know where it was?
Q. Yes, during that interval.
A. No, sir; it was not in my possession.

By Mr. SPENCER:

Q. What month did you succeed Dr. Smyth?
A. I succeeded Dr. Smyth, I think, on the 26th of July, 1893; either the 24th or the 26th of July, 1893.

A 6. C. W. BOOTHBY, sworn for the United States, says:

By Mr. EARHART:

Q. You succeeded the Honorable Overton Cade, as superintendent of the New Orleans mint?
A. Yes, sir; I did.
Q. At the time that you took charge of that office, did Overton Cade, the superintendent, turn over to you a box or boxes said to contain burned money, debris and combustible material, etc.?
A. Yes, sir.
Q. Or burned money alone?
A. Yes, sir.
Q. It was turned over to you as superintendent of the mint?
A. Yes, sir.
Q. Did you give him a receipt for it?
A. I did.
Q. Where is that receipt?
A. The receipt is a matter of record in the letter book.
Q. Have you got a copy of it?
A. No, sir; I have not got a copy.
Q. Have you not a copy from your letter book?
A. Yes, sir; it is copied from my letter book.
55 Q. Do you remember what the packages were?
A. There was one box.
Q. You say you do not know what was turned over to you; that you did not know what was in the box?
A. Well, I looked at the contents which seemed to be the remnants of money, burned money.
Q. Then you do not know it as a fact? You testified a little while ago which the court very properly ordered to be stricken out (said to contain) did you examine these packages?
A. Yes, sir; I looked at them, they were packages of the remains of what was alleged to be burned money.

Q. Can you not tell the jury what you saw; what it looked like, what it was that had been turned over to you?

A. They were packages of burned paper dark, they had the appearance—in two or three cases, you could see indications of bills and the remnants of bills.

Q. Whatever it was, it was turned over to you, as superintendent?

A. It was turned over to me by my predecessor, and I gave a receipt for it as superintendent.

Q. Do you remember me writing a letter to you about it; do you remember sending me a copy of the receipt?

The COURT: It is but fair to say that these records were offered and excluded, so that it cannot be said hereafter that the Government did not undertake to show the transmission of this burned money by receipts; so that if the receipts are not in the record, it will appear that the defendants have objected to their admission.

Q. Here is my letter as special United States attorney in this case, and a copy of your receipt, and state whether you ever wrote me these letters?

Mr. McCaleb objects to the inquiry as to what passed between the attorney for the plaintiff and this officer, as not evidence.

The COURT: What about the official receipt from one party to the other?

Mr. MCCALEB: I object to the receipt because it is a receipt, when it says "a pair of mules." If it was simply a receipt I would not object to it, but so far as it discloses this burned money, it has been ruled out, and it has been ruled out, as being *res inter alios acta.*

The COURT: If it is necessary to trace up this burned money,
56 cannot a party who received it from another, take this receipt and testify from it, and say, "Yes, I received such and such things"?

Mr. MCCALEB: I do not want this receipt to go in evidence, as to the contents of the box.

Mr. EARHART: I am not introducing this witness to prove the contents of the box, but that all the superintendents from one to the other, up to this time, turned over this property to each other.

The COURT. That involves the question of what property they turned over.

Mr. EARHART: It is the property said to be burned money.

The COURT: You (Mr. Earhart) offer the receipt as evidence, and the defendants object to it. If you want to show what the witness received I see no objection to his taking that receipt, if it is a receipt, and refreshing his memory as to what things he received and turned over to somebody. But the defendants object to the introduction of this receipt as such.

Q. Did you write that letter?

A. Yes, sir.

Q. Did you send me a copy of that receipt?

A. Yes, sir.

Q. Where did you get it?

A. It was taken from the letter book.
Q. The original you gave to Overton Cade?
A. Yes, sir.
Q. You kept a copy of the original and copied it into your letter book?
A. Yes, sir.
Q. Is that the letter-press copy of the original receipt?
A. Of course, I received of Mr. Cade, other things, but so far as this $1,182 was concerned, that is the part that I mention.
Q. Is that the letter-press copy from which you gave me the copy?
A. Yes, sir; that part of it referring to the $1,182.
Q. I do not ask you what the contents were, or anything of the kind; here is a copy of the receipt you sent me; is that taken from your letter-press copy?
A. I understood it to be so.
Q. You took that copy from your letter-press copy?
A. Yes, sir; it is the same thing.
Q. Did you take that letter-press copy from the original that you gave Overton Cade?
A. Yes, sir; it seems to be a copy, I judge it to be so.
Q. Did you take that letter-press copy from the original that you gave Overton Cade?
A. This is, as I understand it, a copy of the original given to Mr. Cade.
Q. Look at it and tell me.
A. Well, this is the amount.
Q. Look at the receipt, it is signed by Boothby?
A. Yes, sir.

57 Q. Is that a letter-press copy of the original receipt that you gave to Mr. Overton Cade, signed by you?
A. I think it is.
Q. I would like to know it. Whose letter-press copy is that?
A. Mine.
Q. Where did that letter-press copy come from on the first page?
A. It came from our records.
Q. But where did it come from, that first page copy?
A. This was taken from the receipt given to Mr. Cade.
Q. Who signed that receipt?
A. I signed the receipt to Mr. Cade.
Q. Is that a copy of the receipt you signed and gave to Mr. Cade?
A. I believe it is.
Q. Have you any doubt of it?
A. No, sir; I have no doubt.
Q. You still hold that property as the superintendent of the mint?
A. Yes, sir.

Cross-examined by Mr. McCaleb:

Q. Where is that property stored at this time?
A. It is stored in a vault of the mint.

Q. In what condition was it at the time you received it?
A. Well, the box was sealed, and when the transfer was made it was unsealed and I looked at the contents, and such an amount was alleged to be there, and it was so borne on the records of my predecessor.

By Mr. SPENCER:

Q. Did you, at the time you receipted for the contents of this box, count all of the bills that were turned over to you?
A. It was not possible, they were in packages.
Q. You made no count whatsoever, you merely took it upon faith?
A. Upon faith; yes, sir.

By Mr. MCCALEB:

Q. Then you did not know of your own knowledge, what the contents were?
A. Not the value; no sir.

By the COURT:

Q. Have you the same identical burned money (since that expression has been used) the identical money turned over to you by your predecessor?
A. Yes, sir; I have.
Q. In the same condition, sealed?
A. Yes, sir; sealed; it has not been touched.

58 A 4 *bis.* JOSEPH FIREBAUGH, recalled for the United States, says:

By Mr. EARHART:

Q. You have stated that you were one of the counters in the transfer from Superintendent Cade to Superintendent Boothby?
A. I represented the Mint Bureau branch of the Treasury Department.
Q. You have already testified as to making the transfer by the books of the mint, and by the money actually counted?
A. Yes, sir; I have.
Q. Did you find in the possession of Superintendent Cade a lot of burned money?
A. When we came to finish the settlement, there was a deficit count of $25,000 that had to be explained. There was exhibited to me a box alleged to contain the remnant of the burned money. I would not testify as to anything but real money in it at all, because I did not think it was pertinent, or relevant to my duty.
Q. You did not look inside the box?
A. I did.
Q. In whose possession did you find that box?
A. It was originally, when I came there, in the possession of the Honorable Overton Cade, the superintendent of the mint.
Q. To whom was it turned over?

A. To Captain C. W. Boothby, the present superintendent of the mint.

Q. The incoming superintendent?

A. Yes, sir; the incoming superintendent. Now, I would like to explain, saying that I did not examine the contents specially. The box was sealed. It was opened to me and there were exhibited to me the different contents of the box, but I was indifferent about it, because I did not consider it relevant for me, from my instructions to examine in detail. I was not sent out there to pass judgment on the alleged box.

Q. Then you knew as a matter of fact when you came there as a counter, representing the Mint Bureau, that this property had nothing at all to do with your count, but that you transferred it from one superintendent to another? Is that the fact?

—. I knew from the books that there was a deficit of $25,000. It seemed to be a part of the intention of the outgoing superintendent to show to me that a certain box said to contain money was there for the purpose of explaining that deficit. That is the only thing I know about it.

Q. That is not the question I asked you. I ask you did you turn this box over from one superintendent of the mint to the other?

A. That was done.

Q. Exclusive of the count made by you of the bullion, money, etc., represented in the mint by which you made the delivery
59 from the outgoing superintendent to the incoming superintendent?

A. I do not say exclusive; it was made inclusive of the settlement; it was made part of it.

Q. Was any of this money in that box credited on these accounts?

A. Not at all.

Q. Then it was exclusive?

A. Of course, so far as that is concerned, it was exclusive.

Q. You know as a counter that the burned money had nothing to do with your count, and was not credited on any of the accounts?

A. No, sir; never.

By Mr. McCaleb:

Q. Then what I understand you to say is this, that you did not count, or attempt to count, or ascertain how much burned-money deficiency there was in this box?

A. I would consider it impossible to determine definitely to express in dollars and cents what the value of that box was.

Adjourned.

New Orleans, La., *December 7th*, 1899.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury, and all of counsel present.

Mr. Earhart (to the jury): When this case opened, the Government introduced certain documents in evidence. I have not read any of that evidence to you, and you know nothing about it except

to see it go in. The first evidence I submit to you is the commission of A. W. Smyth, as superintendent of the mint at New Orleans. The next evidence is the bond of Dr. Smyth. The original was here in court, but it has been substituted by a certified copy supplied by the Treasury officials. The next evidence is the demand made by the Government on the two sureties, Conery and McCann, that suit would be brought against them. The documentary evidence was all in, up to Exhibit "B;" in a part of which was a page now marked "2," in which it is shown in the accounts of Dr. Smyth and verified by the testimony of Mr. Styers who made the count of the money in the mint, that Dr. Smyth returned in his account, of Treasury notes, the sum of $428,520.59. That is the Exhibit B of Dr. Smyth's account; and it is shown that up to and including all the accounts of Dr. Smyth as superintendent of the mint, there is no return, either by him, or by the Treasury Department accounting officers, of any deficit. That after he made this return by all his accounts of the $428,520.59, then the accounting officer, Mr.
60 Stier, counted the Treasury notes in the mint to be $428,520.59, but instead of that sum, he only found $403,520.59, making the deficit of $25,000.

Mr. McCaleb for the defendants objects to this mode of proceeding. We are taking testimony without any objection. The gentleman should state to the jury what his evidence shows, instead of arguing the case to them at this time.

Mr. EARHART: The accounts of Dr. Smyth are annexed to the petition. The next document is the accounts of the Treasury Department with the New Orleans mint up to the present time, of the money, etc., carried by Dr. Smyth's successors in office. I do not propose to tell you at this time the object of his testimony.

A 8. FRANK C. MINOR, sworn for the United States, says:

By Mr. EARHART:

Q. You were the book-keeper of the New Orleans mint during the administration of Dr. Smyth?
A. Yes, sir.
Q. You closed his accounts?
A. Yes, sir.
Q. Have you got the books in court?
A. The ledger.
Q. What ledger would show the closing of this account as superintendent?
A. The old ledger, I have it here.
Q. Refer to the page closing his account in that ledger.
A. Yes, sir. What account do you want me to show the closing of?
Q. I want the closing account of Dr. A. W. Smythe, as superintendent of the mint, of Treasury notes; look at page 182.
A. Page 182 is the closing account of Dr. Smythe.
Q. What does the account show?
—. ——.

By Mr. GRANT:

Q. Is that a copy or the original of the account rendered the United States?

A. Yes, sir, it is the original.

By Mr. EARHART:

Q. And the balance was what?

A. 251,520.59.

The COURT: You say this account has already been offered in evidence?

Mr. MCCALEB: Yes; a certified copy of it, as it has been approved by the authorities at Washington.

The COURT: Mr. Earhart, if it be true that you have already offered a certified copy of this account, what is the necessity of this testimony?

61 Mr. EARHART: One account is brought from the Treasury Department; but I want to show by Dr. Smyth's own books, the same accounts of money, $428,520.59; that he carried that amount on his books.

The COURT: Have you not shown that already?

Mr. EARHART: Yes, but I want to show it by the books of Dr. Smyth.

Q. Do you find the item of $428,520.59?

A. Yes, sir; $428,520.59, July 1st.

Q. That was on July the 1st?

A. Yes, sir.

Q. That was the end of the fiscal year, was it?

A. Yes, sir; 1893.

Q. Then, do the books call for that amount of money at the end of the fiscal year?

A. Yes, sir.

Q. What date did Dr. Smyth turn over the mint?

A. The 24th of July.

Q. What was the balance of the Treasury-note account on the 24th of July?

A. $251,520.59.

Q. Is that a balance of the same accounts you read from of $428,520.59, on July 1st?

A. Yes, sir. There had been paid out between the 1st of July and the 24th of July $177,000, which added to the balance will make $428,520.59.

Q. That makes the balance of $428,520.59, by adding the balance on hand $521,520.59 and the expenditure $117,000?

A. Yes, sir.

Q. Then, as a matter of fact the balance $428,520.59, called for at the end of the fiscal year is made up of the balance on hand $521,520.59 and the balance paid out of $177,000?

A. Yes, sir.

Q. And that included the $25,000 deficit?

A. Yes, sir.

Mr. Earhart offers the ledger in evidence, as testified from by the witness.

Mr. EARHART: If the court please, on the *prima facie* case made and this last evidence by the books of Dr. Smyth and the exhibits filed in evidence, the Government now will submit its case and ask for a verdict against the defendants, reserving, however, its right to offer testimony in rebuttal.

Mr. McCaleb states that he and his colleagues, desire to submit a motion to the court, and asks that the jury be requested to retire while the motion is being argued. And the jury left the court-room.

62 Mr. MCCALEB: The defendants now move the court to instruct the jury on the evidence adduced by the plaintiff to bring in a verdict in favor of defendants.

The evidence in the case before the court is this: That when Dr. Smythe was about to go out of office, and his successor came in, Mr. Cade, a proper accounting officer from Washington, was sent down here to count the coin, bullion, silver and gold in the United States mint, and also the currency. These officers, present at the time, went on and counted the gold, silver, bullion, and a part of the currency on hand; that when a certain box was exhibited, containing some charred and burned bills he refused to count. That this box was then turned over to Mrs. Rosenberg and Dr. Barrett belonging to a department in Washington, known as the "burnt-money department." That after they got through with this box, *to* appears to have been used in some criminal trial. Mr. Earhart has promised to offer the record of that criminal trial in evidence, but he has not done so; and then it was used there, and from that day to this, it has been carried on the books of the United States mint at New Orleans, as burned money $25,000 over the signature of the superinte-dent of the mint. That that account, with that item figuring in it has been sent to Washington and successively approved three times by the accounting officers in Washington and the Director of the Mint. Your honor has read the paper, and it is not necessary that I should submit it over again. It is restatement of the same fact in each and every account; and therefore it appears from these accounts offered by the Government itself, that this alleged deficiency is represented by this burned money, and that this burned money is equal to $25,000 in currency.

Now, we expected that the Government would go on and show, or try to show that this amount of burned money was equal to the amount stated by the officers of the mint, that there was an actual deficiency between the amount of this burned money, and the amount for which it is carried in the account. In other words, the Government opened its case fully and fairly at the outset and instead of reserving something here, he sprung on us the fact that we had offered evidence in rebuttal, which should have been brought out by the evidence-in-chief on the part of the Government. No record of the criminal trial being produced and nothing to show what the real amount of this burned money was——

The COURT: What has the criminal trial to do with this case?

Mr. McCaleb: I do not know except that the gentleman, Mr. Earhart, examined witnesses in relation to it. I objected but your honor decided that it was introductory to something else, and you
63 could not control him in his order of proof. I do not know that this court expected that this record would be offered.

In this condition of things Mr. Earhart closes his case, without any explanation of this item, which appears on its face to account fully for *account for* this so-called deficit in Dr. Smyth's returns. Now, if that be so, I say that the Government is not in a position on the evidence that is now in to ask for a verdict. That on the contrary, it is the duty of every plaintiff, especially in a case like this, to make their case certain, especially where it is a question of figures, dollars and cents of a man's own returns; and that the onus is on him to show there is so much deficiency; to show that these amounts carried into the accounts by the Treasury officials do not really equal the items which are placed in this item of $25,000.

The Court: Your idea is, that the Government should go on and prove that this money was not burned?

Mr. McCaleb: So they have proved already, that it was burned, that it was in a charred condition; that the experts of the Government counted this money, but what the result of that count was, they stop right there. They have carried it on their books, as so much, in the items of these accounts. Now it does seem to me, that it is the duty of the Government to show what deficiency, if there was a deficiency in this amount it would not be $25,000 even if there were only ten dollars of the money burned. We are entitled to a knowledge of all the facts that these Government officers acquired by their investigation into this treasury and into this so-called box containing this money.

Mr. Spencer: This suit—the default charged against Smyth is that there was a deficiency in the amount of money which he had received and had in his custody for the Government; that amount is supposed to be $25,000. Now, in order for the Government to recover in this case, it is necessary for it to show, that by actual count of the moneys in Dr. Smyth's possession, that there were $25,000 less than he ought to have there, according to the books of the Treasury Department and according to his own books. It is not sufficient for the Government to say that there are $403,520.59 of money extant and a certain amount of money which was burned, so that, as there were only $403,520.59 of it stamped money, Dr. Smyth is in default to the extent of $25,000. Because your honor will presume, that if there were $25,000 in the box burned up, there was no deficiency such as would charge Dr. Smyth on the bond, because if the ashes were turned over to the Government, the Government would not suffer any at all. The Government would not suffer if it were all burned provided what was left of it was turned over
64 to the custody of the Government. Therefore I say, that if there were, as a matter of fact, $25,000 of destroyed bills in that box, the Government has not shown any loss and cannot recover on this bond; there has not been a deficiency. There is no bar on the part of the Government to establish its case against us

It comes in and shows that the experts counted the money, which was extant in the vaults; they counted the bullion, coin, Treasury notes which were not burned and they found $403,520.59 of it; but an expert of the Government expressly stated, and his report showed, that there was a box handed to him by Dr. Smyth's representative, who said that it contained $25,000 of burned money. But this expert declined to count it, and declined to ascertain whether or not there were $25,000 of cash in the box or not. What is the result of that? It rested with the Government in order to make out its case against us, to go on and prove that it was not money, that it was charred paper, or did not amount to $25,000, in order to establish the deficiency. Because, suppose that it only contained a ten-dollar bill, the Government must fix that amount in order to recover against us. If it did not offer any testimony, what amount could your honor say should be rendered against us. Can you say $25,000? Because your honor does not know what was in that box. It was clearly proven that there was money in that box, several packages of United States Treasury notes, of what denomination, some of the witness- declare they could not tell; it was so defaced; but nevertheless, they all recognize that this box did contain money, and that it was money of the United States, which Dr. Smythe had in his possession for the United States, which he tendered to the counters to be counted, but which he declined to count. Now, I say, that that money is still in the possession of the Government. There is no suggestion that Dr. Smythe ever carried it away from there; on the contrary, the testimoney is, that Dr. Barrett, the expert, as soon as he got there, had this box turned over to him. He first put it into a private vault; he locked that vault and kept the combination, and kept it in *in* his sole custody until some time in December or January, 1894, he brought it out for examination and evidence in the Dowling case; that it went back into the possession of Mr. Cade, who was the representative of the Government, to receive from Dr. Smyth the money of the Government in his possession. Now, we say, that that box containing the money which they say was burned up is in the possession of the Government today, that the money itself is in the possession of the Government, and that the Government has failed to show that it is not in its possession, and
65 consequently, the plaintiff has failed to make out its case.

All this is subsequently strengthened by all the official reports of the subtreasuries, who report the deficiency in burned money. That report is approved by the Director of the Mint, that this $25,000 of burned money—that this technical deficiency was caused by the decrease of $25,000.

Now, under these circumstances, we contend that the Government has failed to make out its case, and that the defendants are entitled to the direction of a verdict.

Mr. EARHART, *contra*: The evidence in this case is according to the pleadings. The pleadings state nothing about burned money; it charges a direct deficit of $25,000. The proof, therefore, fortified by the evidence of the last witness in this case is, that the books of

Dr. Smyth, superintendent of the mint, show that he is indebted to the Government of the United States to the amount of $25,000.

This is an action against Dr. Smyth and his sureties. The Treasury balances, the Treasury returns, and the returns of Dr. Smyth, as annexed to the petition, signed by Dr. Smyth, and by the acting superintendent for him. show that the returns of Dr. Smyth by themselves, show the deficiency of $25,000, without making mention of anybody, or anything else. His returns show that he owed the Government $428,520.59. That is in black and white under his own signature. So says his book-keeper, with the books of Dr. Smyth in front of him, that on July 1st, 1893, he owed the Government $428,520.59 of currency, or Treasury notes. That he had paid out between the 1st and 24th of July, $117,000, leaving on hand $251,520.59, and that the $25,000 were included in the accounts as cash. Now on that showing, Dr. Smyth makes out his own liability to the Government; and the statements of the Treasury Department as well as his own books show that instead of having on hand $428,520.59, on the 24th of July, he had only $403,520.59; so that when he made the return as on hand of $428,520.59, he had no such amount in his possession; and having thus shown a deficit of $25,000, he has never from that day to this made any explanation of the deficiency.

Subsequently to his making this return, putting these figures in his book and informing the Government of the United States, or anybody else that had a right to the inspection of his books, the Government sent a counter here, an official. His name was Mr. Styers. Mr. Styers testified on the stand that he went to the mint, that he looked at the books, and he found $428,520.59 to the 66 credit of the Government on the books. He states that he found the balance to agree with that of the subtreasury at New York and at New Orleans, and that he went on and counted to see whether he could find the $428,520.59 currency, and when he counted he found a deficiency of $25,000.

The court requires no further argument from Mr. Earhart.

The court ruling on the motion to direct a verdict for the defendants:

Officers of the Government who have public moneys entrusted to them must, when called upon, produce those moneys. It may be that when those moneys, or a part of them, have been destroyed by a fortuitous event, over which the officer had no control, which he could not guard against by foresight and care, it may be that he may excuse himself for not producing the money. But it is perfectly plain, nobody can doubt the proposition, that when he fails to turn over the moneys, or any part of them, upon alleging a fortuitous event, or something, which in his opinion, excuses him from producing the money, that the burden of establishing the excuse, is absolutely upon him.

It is perfectly clear to the court, that if there was nothing else in this case, but what has already been heard, there would be sufficient evidence to warrant the direction of a verdict in favor of the Government. It cannot be that the Government is called upon to show

that the excuse made was not good. It cannot be that the burden of proof is on the Government to show that this money was not burned up. The pleadings in this case make it perfectly plain as to what counsel in the case considered were the issues, and where, in their opinion, the burden of proof rested. It is in advance, that we find the statement that this money was burned, therefore it is upon the defendants to show that that amount of money was burned up. Certainly, it is not, as I understand from Mr. Spencer, upon the Government to show virtually (for what would be the effect of it) that the money was not destroyed. Let us suppose that the Government had rested there, without asking of the accounting officers whether Dr. Smyth had produced and turned over to his successor the money or Treasury notes that he was chargeable with. Suppose they testified that he did not, to the extent of $25,000, and stopped there? Would not that have made a case for the Government, if not disproved? Of course, the Government has gone further and spoke about the burned money. I do not think that counsel for the defendants contend, that there was anybody outside the Government, outside of the courts,
67 who by agreeing that this $25,000 of the money was burned, had the right to bind the Government by such agreement or admission. I believe the Supreme Court of the United States has said, that no officer can bind the Government; that the Government cannot be guilty of laches. When the United States come- into one of its own courts and submits itself to its jurisdiction, it stands like other persons. But I do not understand that counsel can serious- contend that the accounts of Dr. Smyth had been settled by the production of this burned money. So the case stands that way, that there is certainly evidence here, that Dr. Smyth failed to account for $25,000 of Treasury notes. There is also evidence indicating why he did not account for them; that he gave as a reason that the money was burned up. We know that much of it; but does that make any evidence, so far as the *prima facie* case of the Government is concerned? I do not conceive that it can be so. Nothing has happened in this case, that can change the burden of proof, of proving that this money was burned by a fortuitous event, which burden is upon the defendants. When we come to that part of the case we will investigate more closely what the law is upon the subject, but certainly at the present time, there is enough evidence before this jury, in my opinion, to warrant a verdict in favor of the Government, for no proof to meet it has been offered. Motion overruled.

And the defendants' counsel failed to make any note of exception to the ruling of the court denying their motion to direct a verdict for the defendants.

On behalf of the defendants in this case, counsel for the defendants offers, introduces and asks to be filed in evidence the deposition of A. W. Smyth, taken under commission before P. T. Rouger, United States consular agent at Londonderry, Ireland, which deposition is here read to the jury on behalf of defendants.

D 2. JAMES M. DOWLING, sworn for the defendants, says:

By Mr. GRANT:

Q. What was your official position in 1893?
A. Cashier of the United States mint.
Q. In the city of New Orleans?
A. Yes, sir.
Q. Under Dr. Smythe?
A. Yes, sir.
Q. Do you recollect the occurrence of a fire in the vault of the mint?
A. Unfortunately, I do.
68 Q. State as briefly as you can, in a narrative form, what you know about that fire.
A. The first knowledge I had of it was on Monday morning, about a quarter past nine, possibly half past nine, on the morning of the 26th of June. When I opened the front door of the vault there was no indication of smoke, but when I opened the inner door, I found the vault full of smoke. I was not quite well and healthy at the time, having been ill, but realizing that I had a great amount of money in that vault, I rushed into the vault, and took out this box of money with the assistance of Mr. Sandidge, who helped me as much as he could. Then I took a seat outside of the vault to recover myself from the smoke, that I had inhaled inside the vault. Now what else do you want to know?
Q. State all you know.
A. I am satisfied now, as I was then, that there were $25,000 worth of all kinds of paper money in that box. The character of the money was such money as I received from stevedores, that frequently visited the mint, in order to get silver dollars to pay their hands off. This money had not come to me from the subtreasury, for when I went there to get money, they gave me packages of new money. But this money that was in the box was money that was taken over the counter in exchange for silver dollars. The contents of this box was counted by me three or four times a week, and it was in that portion of the vault, next to—and contained so much money, and so many persons coming into the vault every day, to see it out of curiosity, that I was obliged to keep that money in the box in the rear of the vault.
Q. Did any other person have access to the vault except yourself?
A. The superintendent of the mint, in case of my sickness or death, had access to it, and had the combination and key to the inner door.
Q. Had he recently made any examination?
A. I think he had. I do not remember what day. It was customary for him to count me once a month, or he could count me every day if he thought fit; that was his privilege, besides the Treasury agents who might come there and count me.
Q. What sort of a box was this tin box, in which this money was placed by you?

A. It was an ordinary tin bank box, such as you would buy in a stationery store.

Q. You say you put money in that box from time to time, in order to meet the daily exchanges that went through your office?

A. Yes, sir.

Q. When did you count the money in the box prior to that fire?

69 A. Every day; I had to make a daily statement to the United States Treasury and had to count my money. Of course, we did not count the money in the larger office, because there it was counted once a month by the superintendent, but he would come into the interior, and count my paper money in the vault, the currency.

Q. How was the vault lighted?

A. By three incandescent electric lights.

Q. What other material was there in the vault, besides this tin box with the money in it?

A. What other material?

Q. Yes.

A. Well, I had another tin box containing ordinary amounts of currency, I do not know how much. Then there was a waste box; then there were bags containing about $600,000 of gold coin, and $10,000 or $20,000 of silver coin, in $500 bags, and a few in $1,000 bags, just to meet the demand of these stevedores, for $1,000 or $500 packages in exchange for currency.

Q. Were there any candles or matches there, if so, for what purpose?

A. Yes, sir; there were candles and matches there for sealing purposes. The packages had to be sealed by the express companies to remit to people in the country, to those who had remitted us old gold and jewelry, the articles would come to us by express, and I would send them money in return for them by express.

Q. Did you have any twine?

A. Yes, sir.

Q. And sealing wax?

A. Yes, sir. These packages had to be sealed, and we had wax for that purpose.

Q. And lightwood?

A. Well, I do not remember particularly about the lightwood. I suppose there was probably some lightwood; I do not remember now, but I know there were candles, wax and twine. I did not know what was in the box until afterwards when it was shown up.

Q. What was in the box?

A. All kinds of debris, it burned up, which was something I could not comprehend. They brought me something of a stub of a candle, that I could not use any more for sealing purposes. There was everything in the box that we used for sealing papers, such as wax, twine and candles and paper. I would make my account every day, and I would add up the figures on a piece of paper, and count my items, even to half dollars, etc., and drop the paper when I was done with it.

By the COURT:

Q. What was the necessity of putting that waste paper in the bank box?

70 A. Because I generally counted my cash every day. I had trays containing so many dollars, in quarter and half dollars, in coins of every description, and I made my count in my vault, because I could not count it outside, but in the vault. Then I made a memorandum of it on waste paper, and I made my general daily statement from that memorandum.

Q. I understand you to say there was a box containing waste paper, and you said there was something more that you did not know was there. You said something about a piece of candle. Now, what I want to know from you is, how is it that you came to have such a box in the vault?

A. I always had it, for I was there four years. I always had it for that purpose and my predecessor used the same box, I think, as I did.

By Mr. GRANT:

Q. What was the box used for?

A. Waste paper, debris, and for such things as are usually thrown about in an office.

Q. What waste paper was it?

A. Well, Government paper. The Government would send us out stationery from Washington, and I would use the blank paper in making memoranda.

Q. Did you receive packages of money wrapped in paper, in the vault?

A. That is what I would get direct from the subtreasury. We used to make a demand for so much, for use in the way of the contingent-expense account. We used to draw for money so much on that account.

Q. How was the money that was sent to you from the country or from merchants?

A. That was in every shape, national bank notes and Treasury notes.

Q. Did it come wrapped up, or otherwise?

A. No, sir; it came loose.

Q. What was the size of that wooden box?

A. I suppose about 2 feet long, about a foot high and about a foot wide as near as I can remember. It had a lid on hinges. I think it was made by the carpenter of the mint; we generally had him to make up the boxes we wanted, but that was there for use in the vault.

Q. You say it was used in the vault?

A. Yes, sir; for years previous to the construction of this new vault, I used this box.

Q. Was it ever used outside of the vault?

A. Yes, sir; during the construction of the new vault, it

71 was under my table in the outer office. It was used there for the same purpose as on the inside.

Q. Was it used in the new vault for the same purpose, after the new vault was constructed?

A. Yes, sir; it was.

Q. Was that new vault used for the same purpose?

A. Yes, sir; I was instructed by the superintendent to transfer all my bullion and Treasury notes into what is known as the standard vault next to his vault. That was a very unsafe place to keep money, but still it was more convenient for me than any other place to keep my coin.

Q. Was it removed during your incumbency in office, from this vault you mention, to the new vault?

A. Yes, sir.

Q. Now, when you had money to ship to the country, or to the authorities at Washington, or anywhere else, how were the packages made up, and where were they made up?

A. We shipped a great deal of money on orders from the sub-treasury, which would be used to pay off plantation hands. I do not know whether you mean that kind of shipments, or not, but we often shipped as high as $150,000 a day in various packages.

Q. Where were the packages made up, in the vault, or outside?

A. If you mean the currency packages to be sent by express, they were made up in my own vault.

Q. This new vault?

A. Yes, sir; all the other vaults contained the coin downstairs; we have only the cashier's vault on the upper floor.

Q. Who took this wooden box out when you arrived at the mint Monday morning, or was it taken out of the vault?

A. It was taken out of the vault.

Q. What was done with it?

A. It was thrown on the ash pile out in the yard.

Q. The ash pile is where you have to put the ashes and other stuff, debris?

A. Yes, sir.

Q. Now, when did you close the vault prior to this fire?

A. I think it was about five minutes to four, along from three to five minutes; time enough for me to get into Mr. Tracey's office, the chief clerk there.

Q. On what day?

A. Saturday, June 24th, if I am not mistaken.

Q. Did you visit the vault before Monday morning?

A. No, sir; not after closing it on Saturday evening.

Q. What condition was the vault in when you closed it Saturday night?

A. It seemed to be in the usual condition; it was well closed as far as I could see.

Q. Where was the wooden box and the tin box?

A. They were in the rear of the vault.

72 Q. Near together?

A. Yes, sir.

Q. Where were the bags of gold and silver?

A. They were also in the extreme rear of the vault, at the extreme end piled up on top of one another.

Q. Were they in proximity to each other?

A. The gold and silver coin; yes, sir. The bags were very badly burned, and I had to count all the gold coin scattered on the floor and some of the silver coin.

Q. When did you count the contents of this tin box, prior to the closing up on Saturday night?

A. To the best of my recollection, the day before; it had to be counted right along. It was three times a week; that was my general average of counting my box, and making up my statements, and I consider there were $25,000, which I counted very carefully, and dimes, quarters and copper cents.

Q. Did you keep any account so you would know how much there was in the tin box Saturday night?

A. Yes, sir; I kept such a count that I counted it three times a week.

Q. And you know there were $25,000 in currency in that tin box Saturday night?

A. I was absolutely certain.

By the COURT:

Q. You say there were all kinds of paper money in that box?

A. Yes, sir.

Q. How was it that there was an even $25,000 in that tin box, was there any reason for that?

A. We had to carry a certain amount to pay for gold and silver, deposited by merchants in Louisiana, and we had to pay them. They did not want me to give them gold, or silver, as they would have to send for a cab to take it away. For instance, Smith Brothers & Company would get Honduras money, and they would ask me to give them that much in currency instead. So that much would be carried loose on trays as I would be paying it out all the time. If there was no demand made on me for currency, by people here, there would be no reason for keeping that amount there.

Q. I understand what you say about the currency, but that is not the purpose of my question. But was there any reason why you should have an even $25,000 in that tin box, in paper money at all times? Why $25,000? Why that particular amount?

A. Why that amount? Because that was a very small amount compared to what I had carried in that box, and as a rule my experience in the mint as cashier was, to have as little money on hand as I could, so that when the officers from Washington came, I would save them the trouble of counting it. In counting silver
73 dollars, they count out a thousand, and put them on a scale and weigh all the others from that. But I had as high as $600,000 in currency there at one time, probably more.

By Mr. GRANT:

Q. What did you do that Saturday night when you closed the vault?

A. I proceeded immediately to Mr. Tracey's office, the chief clerk. It was customary for Dr. Smythe and Mr. Tracey and myself, to go uptown together, leaving the mint together. I proceeded immediately to Tracey's office, and told him it was time to go and he said "All right." He was reading a book when I went in and he jumped up, and we went together.

Q. Where did you go then?

A. We went to a place frequently visited by all of us and had a glass of beer and then proceeded home. We stayed there 10 or 15 minutes, and then proceeded together, Mr. Tracey and myself.

Q. Did you stay at home that night?

A. That evening I think I was invited out to West End, by Mr. Pelsko, a particular friend of mine. I think I went to West End that evening. I am not sure, but I think it was that evening.

Q. Where did you spend Sunday?

A. I think I spent it at home; I may have gone out a little while, I should have gone to church I suppose.

Q. Did you go to the mint at any time after you left it Saturday evening, until you got there Monday morning?

A. No, sir.

Q. What time did you get there Monday morning?

A. I think a quarter past nine, or maybe nine; we are supposed to be there at nine, but I suppose it was a quarter past nine; I do not know whether I got there at nine sharp or not.

Q. You went to the vault first on your arrival?

A. No, sir; I say down and looked over the paper, and Mr. Sandidge, my assistant asked me for a box, that contained previous amounts that were weighed, to be transferred to the Treasury Department, one week in the quarter, and he asked me for that box so he could take it to the counter. Mr. Sandidge was my assistant, so I went up and made this discovery.

Q. The vault had double doors?

A. Yes, sir.

Q. Did you see or smell much smoke when you opened the first door?

A. Yes, sir; it was full of smoke.

Q. What did you see when you opened the second door?

A. As I saw it I rushed in and grabbed this box and got out as much money as I could.

Q. Did you see smoke when you opened the first outer door?

74 A. No, sir; I did not see a particle of smoke.

Q. In what condition were the incandescent lights, when you went to the vault that morning?

A. Well, the last one in the vault was broken, and fragments of the glass all over the floor. The first one was out and the second one was lit, that is as near as I can remember it. Whether it was the first or the second that was burning, I cannot say, but as to the last one, the globe was all in fragments on the floor. But I do not remember which was burning now, the second one, or the first one.

Q. Is Mr. Tracey or Mr. Sandidge living yet?

A. No, sir; they are both dead.

Q. Mr. Sandidge was with you at that time?

A. Yes, sir.

Q. Did these two gentlemen testify in the case of the United States against you?

A. They were called as witnesses on the stand; I do not know whether they testified against me, or not, but they were witnesses in the case.

Q. Did they not give evidence?

A. Yes, sir.

Q. What condition was the tin box in when you examined it?

A. It was in a very bad condition, the sides were broken, and on the top where the handles were, were also broken in, and in a condition that anybody could see its contents, I believe, if they had any eyes the contents could be seen. They all saw it that looked at the box, and I think they so testified. I do not remember now what the testimony was about that.

Q. What caused that condition of the box?

A. The heat, I presume, and fire.

By the COURT:

Q. As you went into the vault, where was the tin box?

A. It was in the rear of the vault, on the top right in close proximity—I do not remember now—to the wooden box, which I say was used for waste paper.

Q. Was it on that wooden box, or on a shelf?

A. My recollection was that it was on the corner of it.

Q. Was that where you left it?

A. I presume so.

Q. You had put this tin box on a wooden box?

A. I presume I did. I rushed in there in the dark and picked it up, and got it out the best I could. I presume it was on the wooden box.

Q. The wooden box was on the floor?

A. Yes, sir.

Q. Where was the usual place for that tin box, was it on that wooden box?

A. No particular place. I would place it anywhere in a hurry, but not near the door.

75 Q. What was the condition of the wooden box?

A. The wooden box was badly burned and charred.

Q. Was the lid of the wooden box on it yet?

A. Yes, sir; but that was up, I think, by reason of throwing papers in. At the top of that, as I remember right, was pretty badly burned.

Q. If the lid of the wooden box was partially open, how could the tin box remain on the wooden box?

A. If you place a tin box across another box on the corner that way, it is easy to put it down on that. For instance, I would come in here in a hurry, pick up the box, and place it there, according to how it is at the time.

Q. The lid of the wooden box was over the tin box?

A. No, sir; it was up here, for instance, here was the cover of the wooden box towards the opening of the vault, and probably I put this tin box there. To the best of my recollection, that is where I found it.

By Mr. GRANT:

Q. Did you examine the contents of the tin box after the fire?

A. No, sir.

Q. What did you do with it?

A. The superintendent and two or three of the officers of the mint, stood around, and ordered me to put it in the vault, and I placed it in the vault in that condition as found, and it remained there—I do not remember how many days, or whether it remained there only one day—when the superintendent, I think, ordered the carpenter to make a wooden box, so that this box could be put into it.

Q. So the tin box could be put into it?

A. Yes, sir; put into this wooden box and it was tied up with ropes, if I recollect right.

Q. What disposition was made with the tin box afterwards, to whom was it delivered?

A. Well, now that is a question. I do not know whether Dr. Smythe took it and gave it to Dr. Barrett, or whether Dr. Barrett took it. I do not know who took the box.

Q. Where did it remain?

A. It remained for I do not know how many days in my vault, in the wooden box. The wooden box was inside of my vault.

Q. Were the contents of it disturbed in any way, during that time, before delivery to Dr. Barrett?

A. No, sir.

Q. Did this vault have shelves in it?

A. Yes, sir.

Q. What was on these shelves?

A. Moneys of all denominations, trays of money.

76 Q. What was the money in?

A. Some of the money was probably in currency.

Q. Was it in boxes or bags, or how?

A. The bags of gold and silver coin were on the floor, piled up on top of one another to a certain height, the shelves were on one side of the vault, and on the shelves I had trays of money of different denominations, of silver coin.

Q. They occupied the shelves?

A. Yes, sir.

Q. The wooden box was down on the floor at the bottom, near the bags of coin?

A. Yes, sir.

Q. You think it was placed there?

A. Yes, sir; that is to the best of my recollection where I found it.

Q. Where did you find the broken glass from the shattered globe?

A. Very near that gold coin that was piled up near the end of the vault, on the floor in fragments; that was the last light in the vault

to my recollection; that was broken and the fragments of the glass flew all over the floor.

Q. Do you remember any of the denominations of the money in that box, that you put in?

A. Yes, sir.

Q. State them as near as you can, from the smallest to the largest.

A. As high as $500 bills.

Q. And how low?

A. As low as one-dollar bills.

By the COURT:

Q. What was the temperature of the box, was it hot or cold, after you took it out of the vault?

A. It was quite warm; I cannot say it was hot because it did not burn my hand, but it was warm, if I recollect aright.

By Mr. SPENCER:

Q. What was the size of that vault?

A. I guess it was about——

Q. I mean the inside of it?

A. Yes, sir; about six or a little over 6 feet high, and about 4½ feet wide, and possibly 10 feet long. I do not remember, I never took the measurements of it.

Q. How were the lighting wires introduced?

A. They were small insertions from the weigh-room; it was a very small hole through a side of the vault, underneath the ceiling of the upper vault.

Q. Did the wire penetrate the wall from the top or the side of the vault?

A. From the upper side of the vault.

Q. What part of it, the front or the back part?

A. I said just about the center of the vault, up towards the
77 ceiling; it came in from the weigh clerk's vault, which adjoined that, only in a separate room.

Q. Who introduced that wire in there, who was it put in by?

A. That contract was let out, but I do not remember to whom, or who put it in.

Q. Did you notice whether or not the contents of this tin box were badly burned and defaced?

A. Yes, sir; very badly burned.

Q. Were you ever called upon by the Government to be present when any examination, if any, of this tin box was made?

A. No, sir.

Q. Did you know at any time immediately after the fire, or otherwise, that the Government had any one to examine that box?

A. I believe there were some experts here at the time, or a short while after, that were sent out here to examine the contents of that box.

Q. Were you ever permitted to be present?

A. No, sir.

Q. Were you ever notified of the investigation going on?

A. No, sir; never officially. I knew of it, heard of it through others, but was never officially notified.

Q. Do you know whether Dr. Smyth was present at this examination?

A. No, sir; I do not.

Q. Do you know whether he was notified to be present?

A. I do not.

Q. Are you willing to swear positively that there were $25,000 of paper currency in that tin box, on Saturday evening when you closed that vault?

A. Yes, sir.

Cross-examined by Mr. EARHART:

Q. You have stated, I believe, on your examination-in-chief, that the time the fire occurred in the vault, was between Saturday, June 24th, and Monday, June 26th?

A. I think it was the 24th, between the 24th and the 26th.

Q. You were the duly appointed and sworn cashier of that mint, under the administration of Dr. Andrew W. Smythe, superintendent?

A. Yes, sir.

Q. You stated that when you came into the mint on Monday morning, June 26th, 1893, you went to the cashier's vault?

A. Yes, sir.

Q. You opened the doors and you entered the vault?

A. Yes, sir.

Q. And that smoke rushed out of the vault?

A. Yes, sir.

Q. Did you immediately go into the vault?

A. Yes, sir.

78 Q. Where did you go?

A. I went to the rear of the vault and picked up this box and brought it out.

Q. You mean you picked up this box, what box?

A. The tin box containing $25,000.

Q. Will you designate by your hand, about how large a box?

A. I imagine that long, two feet, and about 8 or 10 inches wide, and about 6 inches high as near as I can remember.

Q. Then you rushed immediately to that box and picked it up?

A. Yes, sir.

Q. What did you do then?

A. I carried it to the outer door of the vault and laid it on the floor.

Q. What do you mean, what floor?

A. The outer door of the vault.

Q. You carried it out of the vault to the outer door?

A. I carried it out of the vault, and laid it on the outer side of the vault door, in the office-room.

Q. When you rushed in, you saw the smoke so dense, that you could not see where the tin box was?

A. I groped around for it and found it on top of the wooden box.

Q. I understand you to have stated in your examination-in-chief, that this wooden box on which you say you found this tin box, and which you brought out and laid on the floor of your office, had a cover to it?

A. Yes, sir.

Q. And that cover was raised?

A. Always raised, always left open.

Q. And that this tin box containing this money was placed on top of the corner, or crosswise of the corner of the wooden box?

A. On the corner of the wooden box, the larger box.

Q. The cover of the wooden box being thrown back?

A. Yes, sir; against the wall.

Q. Where was that wooden box?

A. In the rear of the vault.

Q. I know, but where?

A. On the floor in the rear of the vault.

Q. Was it close to the shelf, or under the shelf?

A. Yes, sir.

Q. Under the shelf?

A. Yes, sir.

Q. And against the wall?

A. Yes, sir; the shelving was high enough to admit of that.

Q. Then as I understand you, this box, as you went into the vault was at the rear end of the vault, against the wall, as if there was a wall behind it?

A. Yes, sir.

Q. With the lid against the wall under the shelf, and on
79 top of that was the tin box containing this $25,000?

A. On top of the wooden box, on the corner of the open portion of this wooden box.

Q. Then you rushed in and took it off from there?

A. Yes, sir.

Q. Was there not an iron safe, or a small safe in that vault?

A. Yes, sir.

Q. In which you kept paper currency?

A. Yes, sir.

Q. Now, as you have already stated, you were not to visit that vault again from Saturday at 12 o'clock?

A. 4 o'clock in the evening, that was the last time I closed it, that was the last time until Monday morning.

Q. I am speaking of Saturday.

A. Yes, sir; Saturday evening about five minutes to 4 o'clock I closed the door, went to Mr. Tracey's office and walked home.

Q. And you were not to visit there until Monday morning?

A. No, sir; I was not.

Q. And that Saturday evening, you took the tin box which you say contained this $25,000?

A. Yes, sir.

Q. You took it into this vault and placed it on top of that wooden box?

A. Yes, sir.

Q. Why did you not put that paper money in that iron safe where you had been in the habit of putting such money?

A. The safe in the new vault, I considered a perfectly secure safe. This little safe inside was a troublesome matter to be opening, by the combination; and at the time I considered the money in the tin box safe, as I was always adding to it and taking from it. Then I had a large amount of money in that combination safe, but I did not want the trouble of opening this combination every day; it had to be rolled half a dozen times, and everybody knew the trouble about that combination safe. Had it been in the stationary vault, where I had stored the money, I would have had all this money in this little safe, because that was a brick one, but this one was a steel vault, a brand-new vault.

Q. Would not that safe have been a safer place from Saturday evening to Monday morning to put that $25,000 in paper money than to have placed it in a tin box on top of a wooden box contain-g this debris, that you have described in your examination-in-chief?

A. I suppose so.

Q. You say you do not know why you did not put it in that safe?

A. Yes, sir; I have stated why, because I did not want the trouble of making the combination on that little safe.

Q. Who put that wooden box in that brand-new steel vault, containing that debris, of paper, candles and matches?

80 A. To the best of my recollection the employé of the mint directly under my control, named Douglass Burrell; I had a man under me to bring in there whatever I wanted.

Q. You knew what was in it?

A. Yes, sir; I did.

Q. You knew also that matches were lying around there on the shelf of the new vault?

A. Yes, sir.

Q. Did you know there was a coal-oil lamp in there?

A. I think there was.

Q. With coal oil, or what you call septoline, or gasoline oil?

A. Yes, sir; but I do not remember just now anything about that, whether there was oil in there then.

Q. You did not examine to see?

A. I do not remember; I know I had a candle there for lighting when sealing the packages; but I think there was a lamp in there, but whether it contained any oil, or not, I do not know. If I had my previous testimony before me now, I could remember.

Q. You saw matches in that vault then?

A. Yes, sir.

Q. And there was paper on these wooden shelves?

A. Yes, sir.

Q. There were matches lying on the shelf around?

A. Yes, sir; lying on the trays with the silver coins.

Q. After you took out this box and went out into your office and

laid this box down on the floor, did you see a gentleman there, named Gee?

A. Yes sir.

Q. Frank Gee his name is?

A. Yes, sir.

Q. Is that the gentleman there, standing up?

A. Yes, sir; that is the gentleman.

Q. He was an employé of the mint?

A. Yes, sir.

Q. He was there at the time you ran in to get this box out, the tin box?

A. Yes, sir.

Q. After you got the tin box, did he not go into the vault with you?

A. I think he did.

Q. And you both brought out this big wooden box?

A. Yes, sir.

Q. When you brought it out, what did you do with that wooden box?

A. I think he and I took it to the ash pile and dumped it out there; that is to the best of my recollection. I do not know how many minutes that was after my rushing in and getting out that tin box; I was pretty weak after coming out the first time.

Q. Was the box on fire?

A. It was very warm; I do not think it was on fire.

Q. Did you see what was inside of it?

A. Yes, sir.

81 Q. What was inside of it?

A. A lot of trash, a lot of paper, etc.

Q. Was there not some kindling wood?

A. Well, I do not know that there was, what surprised me so much was, when I got this box——

Q. Was there not some kindling wood placed in this wooden box underneath where this tin box stood, that was pretty badly burned?

A. Yes, sir; I believe so.

Q. You saw what was under this tin box?

A. Yes, sir; I saw the contents.

Q. Did you see what burned that tin box, that contained the $25,000 over this wooden box?

A. Well, I saw a lot of charred debris.

Q. State what kind of debris it was.

A. Well, it was paper, twine, and some kindling wood, I believe. I do not remember anything else. I did not itemize everything.

Q. You saw what it was?

A. Yes, sir.

By the COURT:

Q. Did I understand you to say that the wooden box was not consumed?

A. No, sir; not entirely.

Q. Was it burned through anywhere?

A. I do not think it was; it was burned through the center, and up towards the lid; it burned the inside and a portion of the lid.

Q. You say there was some kindling wood in there, that was not burned?

A. That was discovered when it was thrown on the ash pile; it was not in a charred condition, but was in the shape of kindling wood.

Q. Did you notice the waste paper?

A. Yes, sir.

Q. And the twine?

A. Yes, sir; I believe I frequently threw twine in there and wax from these packages, and I may have thrown in the stub of the candle, when I lit a new candle.

Q. What I want to get at is, what did you find in the box after you got it out to the ash pile; tell us that?

A. I found a lot of things, such things as are used in an office, but I cannot account for this kindling wood, because I did not know it was there; but I know the fragments of paper, twine, wax and the stub of a candle was thrown in there; I cannot say how much there was in there, but that was discovered when the box was emptied.

By Mr. EARHART:

82 Q. You say you got this money before Saturday evening, from stevedores and such people that wanted silver coin?

A. I got it from time to time, previous to that; I did not get at one time all of it, but about a couple of thousand a day.

Q. And you put it in this box?

A. Yes, sir; just according to their wants, during the week, they brought it.

Q. Before that fire did you get any money from stevedores or anybody else?

A. Yes, sir; people came down to the mint with money drawn from the bank here, and they would ask me for silver coin, and that was one way of distributing the silver coin without expense to the Government.

Q. Would you keep any memorandum on the different dates, and the different bills of currency that you put in there?

A. That was my strict duty, to make a report daily.

Q. How did you keep the memorandum on Saturday evening, when you put this tin box on the top of the wooden box that had the $25,000; did you count it that evening?

A. How did I get a knowledge of anything in there, except to count it; I counted it the day before.

Q. Can you say you counted it the day before?

A. I cannot say whether I counted it that day or not; I said twice a week, because the superintendent could come in and count me up without any notice, and if it was not there, I would have to explain why it was not there.

Q. At this time and at that time, on Saturday evening, your own knowledge or recollection of that box having contained $25,000 in

money of the United States Treasury notes, is not from any memorandum of any moneys that you got from A B C or D, or any persons coming there, but from recollection; you had no memorandum of the different amounts?

A. My recollection was that on these days, and I suppose it is still the custom, to make up your daily report, which must be specific as to so much gold and silver, and fractional currency there was.

Q. I want to know how you knew this box contained $25,000?

A. I had every reason to believe it was there, because if the superintendent came in and counted me up, it should be there; if anybody got in and took any of it I do not know it.

Q. You have no memorandum or receipts by which you can remember that there was the sum of $25,000 in that box, except your recollection of the fact?

A. The memoranda I made up in the vault from this daily memoranda and from my daily statements after I filled out the daily statements to the Treasury of the United States; after I had done this, I had no use for memoranda; my statements were made
83 up from memoranda, because I had counted the fractional coins, and the bags of silver. I do not know that I counted what was in the box that day, or any other day, but it is a wonder I remember anything on account of my condition at the time; but I did make daily statements; and if Dr. Smyth came in and counted me, he would discover whether it was there, or not.

By the COURT:

Q. Did you have any paper money that was not in that box?

A. Yes, sir.

Q. The district attorney is trying to know from you, not how much money you were accountable for, but whether you knew there were $25,000 in that box?

A. We paid off the hands only on the 15th and the last day of the month; that was called the ordinary account and kept for convenience sake to myself, and I put that money in a smaller safe, because I only had occasion to bring out that currency when I had to pay the men off, that is, the clerks, officers and workmen. There was no reason for my going to that safe every day, as I did, and that accounts for my having paper money in the safe.

By Mr. EARHART:

Q. When you took this tin box out and put it on the floor of your office, and then rushed in with Gee and got out the wooden box and went out to the ash pile, that ash pile was out in the mint yard?

A. Yes, sir.

Q. It is the place where they put the ground debris of the mint? Was it not?

A. Yes, sir.

Q. Is it not a rule, or was it not the rule, at that time, that nothing should be put on that ash pile, until it was ground to dust?

A. Well, there may have been two piles there; they have one for

the sweepings of the offices; I do not know what that ash pile was · it was somewhere near the boiler in the yard.

Q. That is the one that you took this wooden box to?

A. Yes, sir; that was the most convenient one. I do not know whether there were two ash piles, but I know there was an ash pile; I do not know what was thrown there.

Q. You and Gee emptied that box, or turned it over on the ash pile?

A. Yes, sir.

Q. Or what is called the ash pile?

A. Yes, sir.

Q. There was nothing else on that ash pile?

A. I do not remember.

Q. You say there was not a rule there, that nothing should go on that ash pile except what was ground?

84 A. The engineers and men downstairs go through there and do anything they see fit.

Q. Did you ever see anything on that ash pile that was not ground?

A. Yes, sir; I saw all kinds of trash.

Q. You saw what came out of that box?

A. Yes, sir.

Q. You saw some burned kindling wood?

A. Yes, sir.

Q. You saw some burned kindling wood in it?

A. Yes, sir.

Q. And you saw burned paper?

A. Yes, sir.

Q. And you saw where the box was burned inside?

A. Yes, sir.

Q. You say you turned and displayed the tin box that contained the $25,000?

A. Yes, sir.

Q. That was on the top of the wooden box?

A. Yes, sir.

Q. Why did you ever take that wooden box with that debris away out of the mint to that ash pile; there was no fire in it?

A. I had a great deal of coin of all descriptions, and I had money on the shelves, and I wanted to be sure that it did not destroy everything that was there, and naturally we emptied the box that contained anything that was burning.

Q. Was this box burning?

A. I do not know; Mr. Gee could tell you that there was considerable smoke in there, and I do not know whether it was burning or not.

Q. Have you seen kindling wood like that in the mint?

A. Yes, sir.

Q. It was fine kindling wood; pitch pine?

A. I am not sure of that.

Q. Did you ever examine it?

A. I never examined it carefully; no, sir.

Q. When you came back, as I understand you, from the ash pile, did Gee come back with you?

A. Well, I do not know, really. I cannot answer that.

Q. When you got back, where was the tin bank box?

A. I think it was on the floor where I put it; I think so.

Q. Can you not say, you were interested in it?

A. My assistant was there to represent me, while I was absent; I think it was there where I put it.

Q. Did you see it?

A. I have no recollection whether I did see it, but I suppose it was in the same position.

Q. How many minutes were you occupied, taking up the box and running out with it?

A. I do not know, two or three minutes.

Q. And going back you did not see that tin box?

A. I think it was on the floor, to my best recollection.

Q. Did you look at it?

A. Yes, sir; I looked at it considerably, before I left there.

85 Q. Did you look at what was in it?

A. Yes, sir.

Q. What did you see?

A. I saw a lot of charred and burned money, some of it recognizable from the hole where the handle is, or should have been.

Q. How big a pile did you see in there, give us an idea by your hands?

A. I imagine it was well up to the top.

Q. That was about 16 or 17 inches?

A. The box is six inches high, and it could not be higher than that portion of the box, say five inches.

Q. You mean by that that it went clear up the side of the box?

A. The pieces of the side were only inclined about an inch, at the top, showing there were packages there, and likewise the side here.

Q. I only ask you what you saw when you looked at that box; you say the ends were out?

A. One end was out, one or the two sides, I do not know whether one or two.

Q. You looked in there?

A. Yes, sir.

Q. Can you say how this bulk of burned or charred money which you saw in there, how big it was?

A. Yes, sir.

Q. And how high it was?

A. Well, it was very nearly filling the box, except probably at the ends; this box was longer in the length than it was in the height, and it was right up near the hole where the handle should be.

Q. Did you see how much money that remained there that was good?

A. I cannot say how much; I saw money in that condition, but

could not say how much; I saw more or less of it, and it was recognizable, the balance was in very bad condition, charred.

Q. How much of the space was occupied by money that was not entirely burned?

A. Probably an inch towards the top; I do not remember what the space was at the ends, but about an inch from the top, I reckon, anybody could see it.

Q. Did you put your hand on it, to run it up and down, the edges?

A. No, sir; I did not.

Q. Who was there at that time, when you brought the box out and you came back from the ash pile?

A. I think Mr. Classon was there, and possibly Mr. Lynch and George Muniere, quite a crowd around there; they all saw the money in the box; Mr. Clausson was closer to it than the others.

Q. Dr. Smyth was there?

A. Yes, sir.

Q. Where was Dr. Smyth when you went out with the wooden box and brought this tin box out?

A. I think he was in some portion of the building; he used to devote a great deal of his time to the machine shops and his own office upstairs; the places where he used to pass his time, I cannot say, whether he was in his own office, or upstairs.

Q. When was the last time you saw him in your cashier's vault?

A. Well, after the smoke was all driven out—we turned on an electric rotary fan to get the smoke out, and he came in there to take an examination.

Q. That was after the fire?

A. Yes, sir.

Q. How long was it that you saw him there before the fire?

A. I cannot say.

Q. He spent most of his time upstairs?

A. No, sir; not necessarily; he came in and asked me about this old coin on the floor, and I asked him what I should do.

Q. I am not talking of after the fire, but of before the fire; where did he spend most of his time in the mint?

A. I think he spent most of his time around the machinery, and the counters' press-room and he was all over the building; he was a sort of amateur mechanic and devoted a great deal of his time to the running of the mint.

Q. Did he not have a place of choice to go to?

A. Yes, sir; every superintendent has.

Q. That was away upstairs?

A. Yes, sir.

Q. How often would he come and visit you in your vault?

A. Sometimes three times a day, and nearly every evening he would come in to me to get some small change; he was in the habit of having small change going uptown.

Q. Did he come into the vault on Saturday, the 24th of June?

A. I do not know, but he usually did come in on Saturday, before

he went away and got me to give him some change; it is quite likely he did, but I do not remember positively; there was hardly a day that he did not come into my vault, either to get change, or——

Q. Did Dr. Smyth see all this paper around on the shelves?

A. Yes, sir.

Q. These papers there, and this oil can and lamp?

A. Yes, sir.

Q. Was the lamp on a bracket?

A. Yes, sir.

Q. He would visit your vault so often, do you say he had an opportunity of seeing these things all the time, up to the time of the fire?

A. He had an opportunity, yes, sir.

Q. And he never ordered you to take any of them out?

A. Not to my recollection.

Q. He never made any comment about it?

A. No, sir.

Q. Would you know that box and its contents now, if you saw it?

A. I think I could recognize the box; I do not know whether I could recognize the contents or not.

The box produced and placed before the jury.

87 Q. Is that the box on which this tin box stood, containing this $25,000?

A. It looks to me very much like it; I cannot swear to it; but I think it is; I am not close enough.

Q. Come down from the stand and examine it.

(Witness gets down.)

A. Yes, sir; that is the box.

Q. And that is the debris that was in that box?

A. I cannot swear to that.

Q. Does it look like it?

A. I do not remember; I take it that it is the same, or that it was more charred than that—that is, the contents of the box.

Q. Sit down and see if there was any pine wood, or anything like wood, that you saw there; this is a piece of candle.

(Counsel exhibits a candle stub.)

A. I must say, to the best of my recollection that there was nothing so fresh as that (exhibiting a piece of pine); I do not remember all these things here in the box; they may have been there, I was pretty well excited at the time.

Q. This piece was nice, on the top when you arrived?

Q. (A.) Where is all this burned stuff in the box; there does not appear to be any burned stuff there? (Witness pointing to the burned box.)

Q. Take this piece (exhibiting a piece of kindling).

A. Well, that is a slight indication; it appears to me there should be more charred material.

Q. And here is a piece of shaving (in the box) that has not been burned at all?

A. Well, I do not know where that came from.

Q. And now, as a matter of fact, you have examined the wooden box?

A. Yes, sir.

Q. And you find in it some of the debris charred and some not charred?

A. Yes, sir.

Q. The paper and candle and all there?

A. Well, I do not remember seeing the candle there, but if you find it you may put the question to me about the candle; it is just amongst the possibilities that there was a candle there.

Q. You know as a matter of fact, that when you turned this wooden box over that debris of that kind, burned pine debris came out of the box.

A. I saw some come out of it. I do not know the condition of that. I do not remember whether it was in that condition or not; it seems to me that it was more charred than that. I do not know. It seems to me that there are a good many fresh pieces there. I do not remember positively anything about it, but I recognize the box.

Q. Will you kindly indicate to the jury the position you
88 placed this tin box on the wooden box?

A. Yes, sir. Well, now, assuming that you are at the end of the vault; I placed the wooden box on the nearest entrance to the vault, at this end; to the best of my recollection, on that corner.

Q. This lid (of the wooden box) was thrown back towards the back wall of the vault?

A. Yes, sir, the shelf being high enough to admit of that lid (of the wooden box) to be thrown partly back. It fit tight, because the box had to come out sufficiently far enough to allow me to throw in this waste paper, etc.

Q. You see that this wooden box is charred all around the sides?

A. Yes, sir.

Q. And now, see here, at this end if it (is) not charred, it is all nice and smooth. Now, did the tin box stand at that end?

A. This box (as it stands on the floor before the jury), should be reversed, with the tin box on this smooth corner of the wooden box; it was placed there instead of putting it on the floor and having to stoop to it.

Q. But it is smooth (the corner of the wooden box) where you put the tin box?

A. Yes, sir.

Q. That tin box was about that width on the corner of the wooden box?

A. It was caty-cornered. I think the wooden box was placed this way, so I could put the tin box on the nearest corner?

Q. Considering where the jury are sitting, where was the back of the vault?

A. This way; that box, as it sits there should be reversed around. Now this is the extreme end of the vault.

Q. I thought you said it was sitting with the lid——

A. With the lid this side of the vault, from the extreme end of the vault, towards the jury-box. This was to the left of the vault as I went in.

Q. You entered this way, lengthwise of the wooden box on the floor?

A. Yes, sir; it was placed lengthwise, as I went in.

Q. This is according as you say, the manner in which this tin box was sitting?

A. Yes, sir; here is my standing position counting my coin, as the case might be; I would be counting, and I would put the box that way, back where there was gold coin on the floor, but near me, sitting on the wooden box.

By the COURT:

Q. There were bags of coin on the floor?

A. Yes, sir.

By Mr. EARHART:

Q. Now, indicate on the wooden box by a cut of your knife,
89 where that tin box was, on the wooden box?

(The tin box is here produced for the first time.)

Q. Now take that tin box and place it in the position that it was.

A. To the best of my recollection it was this way, standing on the corner of the wooden box; and I would come into the vault, pick it up (the tin box) and put it on the shelf now and again.

Q. This is the tin box?

A. Yes, sir; that is the tin box that the money was in; it is some time since I have seen it; I have no doubt but that is the box. I do not think, however, that both sides were entirely gone. One side was gone, but not the other. This I know was in this condition; the handle rested on the money about an inch from the top, because I and others recognized the bills on the top.

Q. Take this knife and mark just where this tin box stood on this wooden box?

A. I am not positive about it. I am only guessing at it now; that is about it, as near as I can come to it. (Witness having marked position of the tin box on the wooden box, by an incision of his knife.)

Q. Did not the tin box come to pieces when you carried it out?

A. I do not think any of the money fell out, while I was transferring it to the outer door. I do not think it was as bad as it is now.

Q. When you came to the door, did these pieces of tin, that the box was made of, fall out?

A. Well, one side did, and one side inclined inward.

Q. This is the side and this is the back and here are the two ends?

A. Yes, sir.

Q. Was it the side of the tin box or the front that fell out?

A. I think it was the side of the tin box that was broken in to the best of my recollection.

Q. And from there you could see the pile of money that was in there?

A. Yes, sir.

Q. It went up to the top of that box?

A. Very close up to the top.

Q. How long after you laid that tin box on the floor, did you take it back to your possession?

A. My recollection is, that Dr. Smythe ordered the carpenter to proceed at once and make a wooden box, not this box, however, I do not recognize that box as the box he made, but he made a box suitable for this box to be placed inside of, before it was transferred back into the vault. That, I suppose took 15 or 20 minutes. Just the while it took the carpenter to make it.

Q. After he made that wooden box, what did you do with the tin box?

A. The- tied up the wooden box with a rope.

90 Q. But what did you do with the tin box that contained the money?

A. Placed it in that wooden box.

Q. In your presence?

A. Yes, sir.

Q. After you placed it in the wooden box, what did they do with it?

A. Tied it with a rope and placed it in my vault.

Q. You were present and received it from them?

A. It was placed back in my vault, yes, sir.

Q. How long did you keep it?

A. I do not know how long, I think probably about a week or two, maybe not so long; I do not remember now.

Q. You never examined it afterwards?

A. No, sir.

Q. You never looked at it again?

A. No, sir.

Q. This box was only tied with a single rope?

A. It was covered with a lid on top of it.

Q. That is the wooden box?

A. Yes, sir.

Q. Did Dr. Smythe ever take that box and make an examination of the contents?

A. The last time he took possession of it he took it entirely out of my possession.

Q. Did either one of you take possession of this box after the fire, to see what was in it, or what was left of this $25,000?

A. I do not remember any investigation of its contents until the officers came.

Q. By either of you?

A. No, sir.

Q. How long after that did you see this box containing this tin box, taken out of the vault?

A. I cannot remember.

Q. Was it a week, or ten days, or one day?

A. It was just a short while, but I do not know how many days. I believe they requested an officer to come here as soon as possible to examine it, but I do not know when that was.

Q. You never saw that debris of money after that?

A. No, sir.

Q. The last time you ever saw that tin box before the fire occurred, you say it contained $25,000?

A. Yes, sir.

Q. You never looked into it after that?

A. No, sir; it was in such condition I did not.

Q. You never looked to see whether it was in good money or bad money?

A. There was no bad money, but I did not look into it.

Q. You never looked to see?

A. Well, the condition of it was such that I could not count it.

Q. I do not ask you about counting it, you did not even look to see?

A. I only looked at the box, when it was put outside of the vault; from that time on it was in my vault in a wooden box, but I never examined it. I never looked at it, only the time it came out from Dr. Smyth's vault.

Q. You do not know how much good money or bad money was in it?

91 A. Yes, sir; I know there was good money in it because I saw it.

Q. You do not know how much there was?

A. I cannot say how much was good or bad, I could not even guess.

Q. But you are sure that some of it was good and some of it was bad?

A. Yes, sir; that could be seen from the handle of the box.

Q. You say that through the aperture of the box, the last time you saw it, there was charred money and good money in it?

A. Yes, sir.

Q. Now when you got back to the mint Monday morning, there was an electric light burning?

A. There was an incandescent light burning.

Q. Burning in the vault?

A. Yes, sir.

Q. How far was that light from this box?

A. Well, it was very near.

Q. I do not ask you how near, I ask you how far.

A. I cannot say, these lights were high enough for me to walk under, but I should say probably four feet, I guess.

Q. It was burning then?

A. No, sir; that was the broken one.

Q. I do not ask you whether it was a broken one, I ask you whether the light was burning?

A. No, sir; that light was a broken light, the light closest to the box was broken and fragments of the glass were on the floor.

Q. The question I ask you is, How near was the light that was burning over this box?

A. Well, I imagine it was from 3½ to 4 feet.

Q. That is the light of the electric bulb?

A. No, sir; that is the broken one.

Q. You say you came to that mint Monday morning, and that you saw a light burning in the vault, an electric light; now I ask you again, how near was that electric light that was burning, to this box?

A. It was about 8 feet away, I imagine. If I am not mistaken it was the first one as I entered the vault, that was burning. I do not know whether it was the first or second that was lighting, but the last one as everybody saw, was broken to pieces and the fragments of the glass broken on the floor; that broken light was nearest this box.

Q. It was in the upper part of the vault this light was burning?

A. Yes, sir.

Q. How close was this electric light that was broken to the shelving?

A. About two feet.

92 Q. How close was that electric light to the door of the vault?

A. You mean the one that was lighting, or which one do you mean, the one burning?

Q. Yes, the one burning.

A. Well, that was about—I imagine not over three feet from the door.

Q. How far was the one that you say was broken from the door?

A. Well, they were about 2½ feet apart, probably 3 feet apart, in the center of the ceiling of the vault, hanging from the ceiling.

Q. Then I understand you this electric light ran down?

A. It came from the weigh-room, towards the ceiling of the new vault; that is, they had to arrange it to give me three lights, and the lights in the center of the vault ranged apart.

Q. Did you have 3 lights?

A. Yes, sir.

Q. Did you see the center light burning?

A. I do not know positively whether it was the first or the second light that was burning, coming into the vault.

Q. Why did you want to light this electric light Saturday evening when you left there, and were not to be back there until Monday morning?

A. It is pretty hard to examine this question; these lights went out someti-es in cloudy weather, and when they were out there was no occasion to go into the vault at all.

Q. You have to light these lights inside of the vault?

A. Yes, sir; and in some parts of the year, I would have to come out of the vault for the want of light.

Q. You would have to light these lights inside of the vault?

A. Yes, sir.

By the COURT:

Q. Did you leave that light burning there on Saturday evening?

A. My recollection was that I put them out. If I had occasion to use them I always put them out afterwards; that is, to the best of my recollection.

Q. Do I understand you to say that your recollection is not clear as to whether you did or did not leave them burning?

A. My recollection is not clear, whether they were lighted in the afternoon in that part of the year, or not. I do not know whether these lights were burning when I left. If they were burning, it was my custom to put them out.

By Mr. EARHART:

Q. But you do know that on Monday morning when you
93 got there and opened the vault and got this box out, you found the light burning?

A. I found one of them burning.

Q. And the other one broken and not burning?

A. Yes, sir.

Q. Get back to the box. Do you not remember there was a desk in the cashier's office?

A. There was a desk in the cashier's office-room, not in the vault. Yes, sir; there was a table, not a desk.

Q. The vault is in the office?

A. Well, it was not a desk, but a table, as this gentleman here is using, only a little bit larger.

Q. Did you ever see that box out in the cashier's office?

A. Yes, sir.

Q. Under that table?

A. Yes, sir.

Q. I mean that box, wooden box.

A. Yes, sir.

Q. Now, when was the last time you saw that box outside, in the cashier's office, before you saw it again in the cashier's vault?

A. I cannot say what day, we were ready to move into the new vault, consequently I do not remember the day, that that box was moved in.

Q. What was that wooden box doing outside of the cashier's office?

A. Used for the same purpose outside as in the vault, as a waste basket.

Q. What was the purpose of its being used?

A. For throwing waste paper or anything else that might come along into it, you might throw your lunch into it, if you liked.

Q. Did you see kindling wood in it?

A. I do not remember seeing kindling wood in it before it was removed into the vault.

Q. Did you see kindling wood in it on that day when you took it out?

A. Yes, sir; it looked like kindling wood to me.

Q. And it is kindling wood—you know kindling wood?

A. Yes, sir; I do.

Q. It is something like this piece that I hold in my hand?

A. Yes, sir.

Q. This new steel vault, as I understand it, was made and completed a short time before this fire.

A. I do not remember how long I was in there before this accident.

Q. Can you not give us an idea—we were not there and you have been in that mint so many years?

A. I have been trying to forget all about it; it is not very nice or pleasant to remember, but I do not know how long I was in that vault before the fire, I cannot answer that intelligently at all.

Q. I ask you how long that new steel vault was completed for use before that fire?

94 A. I would not like to make a statement, because I cannot make it intelligently, I cannot tell; I had no occasion to remember these things at all.

Q. Three months?

A. Maybe longer than that, 6 months, I do not know when this vault was ready for business, I never kept a record of that.

Q. Do you not know as a fact that that vault was proposed and completed during your administration, to get a safer vault to keep the Government money in?

A. Yes, sir; that was the object.

Q. And it was pronounced to be one of the safest vaults when you took charge of it, this new steel vault?

A. I never heard anything about it, but it was considered a very good vault.

Q. Did not Dr. Smythe supervise the construction of that vault?

A. No, sir; he had nothing to do with it, it was a contract let out. The Supervising Architect at Washington has got the control and he attends to the construction of Government vaults. Dr. Smythe had nothing to do with it, but simply to look on and make his favorable or unfavorable remarks about it.

Q. But he visited the work while it was being done?

A. Yes, sir; I think he did.

Q. It was during his administration that this new steel vault was made?

A. Yes, sir.

Q. Now, I am about closing. I understand that you, in this new steel vault, on the 24th of June, 1893, when you left that mint building, you had on the top of this wooden box, charred and burned as it is now exhibited to the jury, in a tin bank box, the debris or remains of that tin box now sitting on the top of this wooden box, the sum of $25,000?

A. To the best of my recollection that is where I found it.

Q. I further understand that in that new steel vault, with the wooden shelving, that paper was on the wooden shelving, and matches on the wooden shelving, and candles in that vault?

A. Yes, sir; a few matches.

Q. And this box had debris in it, which you subsequently ascertained to consist of kindling wood?

A. Yes, sir.

Q. And that was the condition of the vault and its contents, so far as this $25,000 is concerned, from Saturday evening until Monday morning, June 26th, when you visited the mint at that time?

A. Yes, sir.

Q. And you say you do not know how this debris got into that box, you never examined it?

A. No, sir; I never examined it.

95 The wooden box and the tin bank box, the subjects of this cross-examination, are now offered in evidence on behalf of the Government.

Adjourned.

NEW ORLEANS, LA., *December 12th*, 1899.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury and all of counsel present.

JAMES M. DOWLING, recalled for the defendants, says:

By Mr. SPENCER:

Q. Besides the position, as cashier of the mint, which you testified you held during 1893, did you ever hold any other position in the mint?

A. I entered the mint on the 1st April, 1883.

Q. Under whose administration did you then enter the mint?

A. Dr. Smyth's.

Q. How many terms of office did Dr. Smyth have?

A. Two terms.

Q. Were they continuous, was he his own successor?

A. No, sir; Mr. Montague came in in the mean time.

Q. The term of office held by Mr. Montague intervened between the first and second terms of Dr. Smyth?

A. Yes, sir.

Q. What position did you hold under Dr. Smyth during his first term of office?

A. Assistant weigh clerk.

Q. How long did you hold that position?

A. About two years, I guess.

Q. Was that the only position you held under Dr. Smyth during his first term?

A. I frequently acted as weigh clerk, but before you go any further I want to state that I was book-keeper under Dr. Smyth. I was promoted from assistant weigh clerk to book-keeper.

Q. Under Mr. Montague?
A. Yes, sir.
Q. And from book-keeper what were you promoted to?
A. I was promoted from book-keeper to be chief clerk.
Q. How long did you hold that position?
A. Four years.
Q. After Mr. Montague's term expired were you continued in that position by Dr. Smyth?
A. Only for a short while.
Q. What position were you then assigned to?
A. Cashier.
Q. Then between what years were you employed in the mint?
A. Between 1883 and 1893.
Q. In other words, you occupied positions in the mint for 10 years?
A. Yes, sir.

96 Q. Reverting to the contents of this tin box, I wish you would state, not the denomination, but what the character of the paper money that was in that tin box was.

A. Well, to the best of my recollection, it consisted of national bank notes, silver certificates, Treasury notes, so called; that is the best of my recollection.
Q. In other words, obligations of the Government?
A. Certainly.
Q. I understood you to say that the shelves on the inside of this vault contained piles of money?
A. Yes, sir.
Q. Silver and fractional coin?
A. Yes, sir.
Q. And that you stored on the floor bags of coin, gold and silver?
A. Yes, sir.
Q. Adjacent to this wooden box?
A. Yes, sir.
Q. I would ask you to state whether or not it was unusual for you to have placed that tin box on the floor of the vault?
A. No, sir; it was very convenient for me to place the tin box where I found it, on the corner of the wooden box, because I did not have to stoop so low, as I would, if I deposited it on the floor; and when I discovered it on this morning it was on the corner of that wooden box.
Q. Did you have any particular place to put that tin box at night?
A. No particular place, it just depended upon my hurry.
Q. I understood you to say that this tin box, when you brought it out of the vault on Monday morning, when the fire was discovered, and you placed it on the floor, it was in rather a delapidated condition?
A. Yes, sir.
Q. That one of the ends and one of the sides were out?
A. Yes, sir.

Q. Did you or not recognize any of the contents of that box?

A. Yes, sir.

Q. Of what did the contents consist?

A. I could not see what it consisted of in that hurried view of it, but I looked in and saw money on the top of the box.

Q. Could you tell whether the charred and burned remains were the remains of money or other materials?

A. The remains of money.

Q. Did you recognize any of it as money?

A. Yes, sir.

Q. What was the condition of the contents of that box?

A. Well, it was in a very bad condition, charred, I think, nearly all of it, charred, some of it was recognizable, the denominations, I could not state.

Q. Was any of that money, so far as you could see by your examination, totally destroyed and burned to ashes?

A. I imagine it was totally destroyed, so far as circulation was concerned; it was destroyed so much that it could not be used in circulation.

97 Q. Was any of it burned to ashes?

A. Yes, sir.

Q. Could you say what proportion of it was burned to that extent?

A. To the best of my recollection, nearly all of it.

Q. The particular point where you looked through the hole of the box, you say you could see the money, and the remains of the money within about an inch of it?

A. Yes, sir; that is my recollection.

Q. That is right about the center of the box?

A. Yes, sir; where the handle was.

Q. Where the handle was melted it had fallen in?

A. Yes, sir.

Q. This iron piece containing the handle had fallen in and showed the money?

A. I suppose it fell to one side as I grabbed it up, but I saw the money within an inch of the top of the box.

Q. When you rushed in there and grabbed that box, did you do so hurriedly, or deliberately?

A. Very hurriedly.

Q. What did you do with it?

A. I put it down outside of the vault on the floor.

Q. Is it customary or unusual, where such a thing as a fire has occurred in a vault, as you mention, for the employés to leave the contents of the vault just as they find them, or not, until the Government experts arrived?

Mr. Earhart objects to the question of custom.

Q. What rule if there is any that you know of, is there, with regard to the disposition of property of the Government where any accident happens to it that might call for an investigation?

A. I do not know of any rule, or regulation. That is something

very unusual, I suppose, and there is no regulation about it for it was not in a condition to be examined at all; that is, counted. I imagine that the thing was in such a condition it could not be possible to do anything with it, but leave it there for the superintendent to witness it.

Q. Do you know of your own knowledge how that fire originated?
A. No, sir; I do not.
Q. Did you put any kindling wood in that wooden box?
A. No, sir.
Q. When the doors of this vault are closed, is the vault air-tight?
A. Well, I imagine so; I could not swear to that, but I suppose it is.
Q. Did you notice, or did anybody notice any smoke issuing from that vault prior to the time that you opened the outer doors?
A. No, sir.

98 Q. When you were engaged in sealing packages of money in there, did you or not close the doors behind you, or did you leave them open?

A. I left them open while I was in there sealing packages. While I was inside of the railing, I always left the doors open; in our day we had a railing outside the vault which separated the office from the vault.

By the COURT:

Q. Of what material was that safe made?
A. Steel lined, I do not know what the outer material consisted of, but the inside was supposed to be steel.
Q. Both the sides and ceiling were steel lined?
A. I think they were, I am not sure, I do not know just exactly what the contract was; I do not remember, but it had the reputation of being a steel-lined vault.
Q. And the floor; what was that made of?
A. That was also steel.
Q. And the doors were steel?
A. Yes, sir.

By Mr. SPENCER:

Q. The shelving was made of wood?
A. Yes, sir.
Q. That was the only wood on the inside of the vault?
A. Well, we had frame rack, two feet, over where the bags were all stored, that held the receipts of the express companies in packages, a metal arrangement that contained the receipts and the express books of the express companies.
Q. Of what material was the shelving rack made of?
A. I suppose pine wood.

By Mr. EARHART:

Q. You say you took the tin book containing the $25,000 of money—the box that has been exhibited to the jury—and laid it on the floor, anywhere in that vault, when you had a safe to put it in?

A. Yes, sir.

Q. A safe that it would take you about a second to open?

A. Yes, sir.

Q. And you tell this jury also, that you took a box of that kind, when you had a good steel safe in that vault—you took the $25,000 of money in that tin box and laid it on top of this wooden box?

A. Yes, sir.

Q. Closed the vault and left that electric light burning and went off; is that what I understand you to say?

A. I do not know about the electric light burning, but I found one burning when I arrived Monday morning.

99 Q. And you did that, as I stated, on Saturday night, when you left you took that tin box, exhibited it to the jury, containing the $25,000 of the Government's money, and placed in your custody by Dr. Smyth, superintendent of the mint, and placed it on this wooden box containing this combustible material?

A. Yes, sir; that is where I found it.

Q. You testified you put it there?

A. Yes, sir.

Q. And on Monday morning when you came there, you found the electric lights burning?

A. I found one of them burning.

Q. You closed the vault yourself?

A. Yes, sir.

Q. And you opened it yourself?

A. Yes, sir.

Q. You closed both the steel doors of that vault?

A. Yes, sir.

Q. You did that, and while you did that, you had a safe in your vault in which you could have put this money; is that a fact?

A. Yes, sir; I had a combination safe inside of that vault.

Q. At that time you were cashier, appointed by and in the employ of Dr. A. W. Smyth, superintendent of the mint?

A. Yes, sir.

Q. What was the length of that vault?

A. I suppose about 11 or 12 feet; I do not remember.

Q. What was the width?

A. Well, now, I do not see how I can answer that intelligently, about the width or length. I can only say about; I never measured it. Of course, if you want me to answer, the best I can say is, I presume 4½ feet, not over five feet, wide, and probably seven feet high.

Q. Is it not a matter of fact that that vault was an entirely new steel vault?

A. An entirely new vault.

Q. And that you were the first cashier to occupy that new steel vault?

A. Yes, sir.

By the COURT:

Q. Did you say there was a combination safe inside the vault?

A. Yes, sir; a small safe about three feet high, and about two and a half feet wide.

Q. Was it large enough to have taken this tin box inside?

A. No, sir; the pigeon-holes were rather small; the inside of these safes are very small, there is a great deal of room taken up by the thickness of the sides; it was two and a half feet wide and about three feet high. The combination of that safe had never been changed by me from the time of my predecessor; it was one of these things that we had to revolve around, and I kept my ordinary accounts in that, that I had occasion to use from twice a month.

100 By Mr. EARHART:

Q. As a matter of fact, do you not know that when the doors, the inside door, which is a steel door, was shut, it was about that thick (2 inches)?

A. Yes, sir.

Q. And the outside door, which is the door you lock—that when these doors are closed, the vault is absolutely air-tight?

A. I believe so, I do not know; I would not swear to it.

Q. Would you like to be shut up in that vault for half an hour, with all the doors closed?

A. Well, I think I could stay there.

Q. How long do you suppose you could live in that vault, breathing your own air over again?

A. That I cannot say.

Q. You examined that vault because you kept the money of the Government in it; did you find a single air-hole in that vault, after the doors were closed?

A. Well, all the electric light wires came through the weigh-room, and I did not consider it air-tight unless that space was completely blocked up.

Q. Did you see any hole by which that electric light wire came through that vault, from the next vault—that came from the next vault and not from the outside?

A. From the weigh-room vault?

Q. Yes, that vault has a partition?

A. Yes, sir.

Q. Do you not know as a fact that that vault is perfectly air-tight?

A. No, sir; I do not say it is air-tight; I never examined it closely to that effect.

Q. If any air came through into that vault, it came through the next vault, through the little space that might be between the electric light apparatus, which, except for that, made it air-tight; I mean the space for the wire which runs between?

A. Yes, sir.

Q. That would be the only place?

A. Yes, sir.

Q. Would it be a very infinitisimal amount of air or atmosphere that would come through?

A. Yes, sir.

Q. Then that was to your knowledge a perfectly air-tight vault?

A. In so far as that exception is concerned, which you say is a very trifling one.

Q. Now, this safe that was in there; it was not absolutely necessary to lock that safe, by the combination lock every night, you might shut the door of the vault, that would be sufficient?

A. I considered everything absolutely safe in the vault.

Q. But I am talking about this little combination safe; it was not necessary to lock that little safe every night, but close the door and put the money in that, after you had locked the other two doors?

A. I do not know about that; these safes are for a purpose, and if they are not locked, there would be no necessity for them.

Q. Could you not turn the lock on these two outer doors—

101 could anybody then get inside that vault?

A. I do not know that.

Q. Do you not know that nobody could get into that vault but yourself?

A. No, sir; I do not know that.

Q. Was not the inside of that safe about two feet wide; I mean that steel safe?

A. I do not think it was on the inside measurement; of course I have no recollection positively, but I hardly think it was; even if it was, most of it was in compartments, pigeon-holes.

Q. Was there not room enough to hold all of that $25,000?

A. I suppose they could be crowded in; this money was loose, it was not in packages.

Q. Is not the inside of the safe 20 inches deep?

A. No, sir; I do not think it was.

Q. Was it not from 32 to 33 inches high inside?

A. I am positively sure it was nothing like that inside measurement; it is very easy to establish that fact, as it is down there yet.

Q. Where was this coal-oil lamp?

A. To the best of my recollection it was attached to this rack arrangement, where these Southern Express receipts were stored.

Q. Was it at the right-hand side, or back in the rear?

A. It was at the extreme end attached to this wooden pigeon-hole arrangement; if I remember right it was a cast iron, on a hinge, or screw; I do not remember now which; it was on the floor of the vault to the best of my recollection.

Q. None of the oil was spilled out?

A. I do not remember anything about the contents at all.

Q. If you had charge of this $25,000, you certainly must have looked to see if the oil came out of the lamp?

A. I do not know whether there was oil in it or not, it was there for a long time and very seldom used.

Q. I mean after the fire; did you see the lamp after the fire?

A. Yes, sir; I suppose I did, I saw everything on the floor at the time, and this lamp was there, I suppose, with the globe broken.

Q. And it was not on the floor Saturday night when you locked the vault?

A. No, sir.

Q. Was there any other part of the lamp on the floor?

A. Well, whatever it was attached to, I think it was a piece of cast iron; I do not remember the lamp fitted in a socket.

Q. Did you not see the lamp chimney that belonged to the lamp?

A. That was broken to pieces to my recollection; it was broken on the floor.

Q. Do you swear it was broken?

A. Well, I think so, there was a lot of glass there from one
102 of these incandescent lights, from the globe; I do not know whether the lamp chimney was broken or not, but I think it was; the fall must have been three feet from where it was hanging on this pigeon-hole, at the extreme end of the vault; I should think that the fall would break the chimney, but I am not positive about it.

Q. This shelf that was over this wooden box, that Mr. Spencer asked you about on your last examination; do you know the width of that shelf?

A. I presume a foot, 12 inches.

Q. Was it not wide enough to come clear over that wooden box?

A. No, sir; to the best of my recollection that box was not directly against the side of the vault, because then it would not be handy to throw things into it.

Q. Was it not closed?

A. No, sir.

Q. How do you know it was not closed?

A. If this box is a certain width put under there, I would have trouble in putting things into it; they would go on the floor if the box was all the way underneath that shelf.

Q. As a matter of fact, do you not know that the shelf over that box was a great deal wider than the box, as it is raised now?

A. I testified, to the best of my recollection, that the width of the box was about 12 inches, as near as I can remember; I would have to guess at the size of that box if it was not now before me; I cannot remember six years ago.

By the COURT:

Q. Make one matter plain to me about this lamp. Do I understand you to say that this lamp was held by a bracket?

A. Yes, sir.

Q. What do I understand about the location of that lamp when you closed the vault on Saturday; where was it then?

A. We will just assume this is the vault here (the witness-box); here is this pigeon-hole arrangement attached to this pigeon-hole structure; when I opened the vault Monday morning, this lamp and everything was on the floor.

Q. On Saturday the lamp with its chimney was on its bracket, and the bracket fastened to this pigeon-hole?

A. Yes, sir.

Q. And when you came in on Monday, this lamp was on the floor?

A. Yes, sir.

Q. Was the lamp broken then?

A. No, sir; it was not; the lamp itself was something of a tin substance, or metal; as to the chimney I do not know whether it was broken or not; I imagine the distance it fell would have broken it, but I do not know.

Q. But the lamp was on the floor?

A. Yes, sir.

103 Q. In what position was it; was it standing?

A. It was just on its side.

By Mr. EARHART:

Q. Did you ever see any kindling wood like that in the mint?

A. I have no recollection of seeing kindling wood exactly like that; I never had occasion to examine the kindling wood at all; I know we bought kindling wood; it was no part of my business to examine the kind of wood there was in the mint, I do not know anything about it.

Q. Then as a matter of fact, you were perfectly indifferent when this $25,000 were burned how that wood came there, into that box?

A. Well, I do not know anything about that; I testified already that I do not remember the contents of this box so clearly, until I was asked to identify it. I do not remember seeing anything of that kind (kindling wood).

Q. Not that kind of kindling?

A. No, sir.

Q. Was it not split up there in the back part of the yard, from big pieces of pine wood?

A. I do not know that; we had men employed for the purpose of kindling fires in the mint; it was their business.

Q. You never made inquiry after this fire, to see how this stuff got into this box?

A. I have been inquiring of myself ever since, how it got there and I cannot find out.

Q. And you do not know how this kindling wood came into that wooden box, over which you placed the tin bank box with the $25,000 in it?

A. It was a surprise to me when I saw it.

Q. When you rushed in and took this tin box and brought it out; now after you came back there where was Mr. Clawson?

A. I think Mr. Clawson was present at one time when the box was looked into.

Q. Did he not go into the vault with you?

A. Well, I am not sure whether he did or not.

Q. After you opened the vault?

A. I am not sure about that, three or four gentlemen from the various offices came there and looked at this tin box, while it was on the floor outside of the vault; but I do not remember any of them coming inside; possibly they did, but I was to worn out to notice; I know we had an electric fan in there, and we turned it on and got the smoke out as quick as possible.

Q. You know that a new bulb was put on the electric light; did that bulb burn?

A. Yes, sir; I think so.

Q. The new bulb was put on this electric light in the vault and that bulb burned, after the fire?

A. I do not remember that at all

Q. Did you not go back in the vault?

104 A. Certainly I went back; I had occasion to go back and forth all the time, in and out.

Q. You know that the electric light burned after that?

A. Yes, sir; I imagine it did, because we had three of them.

Q. We were not there; you were looking at it and you know whether it burned or not?

A. I think so, but I cannot swear to any particular light; we had three lights there.

Q. You certainly would have noticed it if it did not burn?

A. Yes, sir; I think so, but you are asking me now for a statement of facts which I cannot make; I must trust to my memory.

Q. You kept a kind of a set of books at the time.

A. Yes, sir.

Q. In your handwriting?

A. Yes, sir.

Q. Showing how much money you had in the Treasury, and how much you had there?

A. Yes, sir; I had to make a daily statement to that effect.

Q. When did you turn the electric fan on, after you got back from putting this wooden box on the ash pile?

A. As soon as we thought of it, as soon as possible.

D 3. DOUGLASS BURRELL, sworn for the defendant, says:

By Mr. SPENCER:

Q. What was your position in the mint during 1893?

A. A workman.

Q. What were your duties as a workman?

A. To wait on the cashier, to help him open the vault and carry the money.

Q. A sort of handy man around there?

A. Yes, sir; to the cashier.

Q. Who made the fires in Dr. Smyth's office?

A. I made the fire down-stairs, but they had a man by the name of Johnson, a porter and it was his duty to make the fires upstairs.

Q. Where was the cashier's office situated, upstairs or down-stairs?

A. Upstairs.

Q. Did you ever make any fires in Dr. Smyth's department?

A. Well, I used occasionally to make fires in the cashier's office.

Q. Do you remember making any fires there, say, in June or May of 1893, or anywhere around that time?

A. Well, fires were kept during these months to dry the vaults;

sometimes Johnson would make fires and sometimes I would make them.

Q. For the purpose of drying the vault?

A. Yes, sir.

Q. Did you ever make fires like that in the cashier's office?

A. Yes, sir.

Q. What material did you use to start the fires with?

A. We always used kindling.

105 Q. Do you know this wooden box (in court)?

A. Yes, sir.

Q. Did you ever see it before?

A. Yes, sir.

Q. Where?

A. In the cashier's office, this waste box we called it.

Q. Where did you ever see this box?

A. In the office and on the outside of the vault, in the enclosure, that is, just outside the vault.

Q. Did you ever see it inside the vault?

A. Yes, sir; I put it in there; it was my duty to put it in there and bring it out.

Q. Did you ever see any kindling wood in that box at any time?

A. Yes, sir; we used to put the waste paper and throw almost anything into it.

Q. Did you ever put kindling wood into that box?

A. Yes, sir; sometimes if I would be using kindling wood and if I did not want to carry it downstairs, I would throw it into the box; sometimes I would take the waste out in the basket, or make fires with it, or carry it downstairs occasionally.

Cross-examined by Mr. EARHART:

Q. Where did you get the kindling wood?

A. Got it from downstairs.

Q. From whereabouts downstairs?

A. Out at the pile where we kept the wood. I used to prepare it myself; I would go and get a hatchet and chop it up myself.

Q. You chopped it up?

A. Yes, sir; and Johnson used to do the same.

Q. Did you see kindling wood sold around the streets of New Orleans?

A. Yes, sir.

Q. Split kindling wood?

A. Yes, sir.

Q. Straight pieces sawed up?

A. Yes, sir.

Q. This kindling wood that you got in the mint, you went out in the yard, and split it off the pine cord wood, did you not?

A. What is the question?

Q. I ask you, the kindling wood you got to make fires with, you went out in the yard of the mint, and cut it off the pine cord wood?

A. Well, it was sawed sometimes and we would have to split it up.

Q. Who prepared and sawed it?

A. Johnson would do it, and sometimes we bought it that way; sometimes it would come there but Johnson invariably prepared it that way.

Q. Did you ever look at this kindling wood in this box?

A. I looked at it several times, because we used it down there.

Q. You used two kinds; sometimes it was in little blocks, and sometimes it was split off the cord stick?

106 A. Yes, sir. I cannot just exactly say how they got them, but sometimes we prepared and sawed it up to fit, and sometimes we cut it up, invariably.

Q. You say you have been in the habit of making fires with kindling?

A. Yes, sir.

Q. Do you know, after bringing in the kindling wood, to make fires in the mint, when the weather was not cold enough to make a fire, you left the wood there near the grates?

A. Well, not up in the office, because it had to be kept clean and neat.

Q. Was not that the habit?

A. No, sir; not in the cashier's office.

Q. Had you boxes in all the offices to put kindling wood in?

A. I do not know about that, but I know about the cashier's office; we had to keep that very clean; we could not leave anything around the cashier's office, even the paper, we picked it up.

Q. When did you see that box the last time before the fire?

A. That box was in there almost every day, in the cashier's office.

Q. Before the fire?

A. Yes, sir. Well, I saw it every time I went in the cashier's office, when I was up there; I was called every day to the cashier's office, carrying money.

Q. You saw that box in the cashier's office, every day before the fire?

A. Yes, sir.

Q. When was the first time you saw it after the fire?

A. Well, I saw it just when Mr. Dowling or some one rung me up that there was a fire, and I ran upstairs, and there was such a smoke that you could not see, and I remember pulling him out of the vault; he was so exhausted with the smoke. I grabbed him out; then the crowd came, and after that I think Mr. Gee and Mr. Dowling took hold of the box, and carried it to the ash pile.

Q. That was the next time you saw it after the fire?

A. Yes, sir.

Q. Did you see it on the ash pile?

A. I do not know whether it was left there, or not, but I saw it; I know I saw them carrying it out, Mr. Gee and Mr. Dowling.

Q. Where would this box remain; what part of the cashier's office would it remain, in order to put this kindling wood, debris and all that stuff of the cashier's office into it?

A. It was in the cashier's office; I do not know just what part it

led to, but I know it was there as a waste box; Mr. Dowling used it as a waste box.

Q. I am asking you, was this lid always up on this box?

A. I do not understand what you mean.

107 Q. This is the lid (pointing to the lid of the wooden box), was that always up?

A. Yes, sir; always until I put it back into the vault, or in the evening they would close it up; sometimes they would close it up and put the tin box on that; sometimes I would see the tin box on top of that box, or on one of the shelves; sometimes I would see it down on the floor; sometimes I would go upstairs and lock the vault.

Q. You never went in there and took any of the kindling wood out of the box?

A. When?

Q. In that cashier's vault, before the fire.

A. Well, sometimes when the waste got full, I would take it out invariably; I would use it myself, put it away to kindle fires in the morning.

Q. You put it away to kindle fires in the cashier's vault where he kept his money?

A. Well, not all the time; I do not say that. I say that sometimes when Johnson would not make the fires, or went out, it would be my duty to come up, and I would bring up some kindling, and if I did not use all of it, if I did not go downstairs, I would throw it in the waste box.

Q. A little while ago you told this jury, that right in that vault, you went in there and saw this tin box on the top of this wooden box.

A. That is the one that opened and closed.

Q. You saw this box sometimes when you went in there to get kindling wood?

A. That is in working hours, when the box was used; when I made that statement I meant—I meant that morning when I went in when the vault was open, or in the evening when closing up. Mr. Dowling there put this tin box on the top of the wooden box.

Q. You would go in there and get kindling wood from his box in this vault?

A. If there was any other waste left, I would take it out, but the kindling wood was not in this box all the time.

Q. Sometimes it was in there?

A. Yes, sir.

Q. And you would go in and get it out of the cashier's vault?

A. Yes, sir; get the waste paper and some kindling.

Q. Sometimes when you wanted to make a fire you would do that?

A. Yes, sir; if the box was full, I had to clean it out; it was my duty to clean the box out and empty it. In fact I kept the cashier's vault clean and waited on him.

By the COURT:

Q. When this large wooden box was taken out of the vault, when it was discovered there was a fire in there, was the box itself on fire?

A. Yes, sir; it was smoking.

108 Q. Do you know whether there was any fire burning in the bottom of it? Was the stuff in the bottom of it on fire, or was it simply what we see here, charred?

A. It was charred and burning, and smoke was rolling out. After I got Mr. Dowling out, I thought the fire was greater than it was, but it was smoking when they carried it to the ash pile.

Q. Did you look into it at that time?

A. I did not look minutely into it, because it was the duty of the officials to be around, but I looked as everybody else would; because the officials were there and I did not want to get too close.

Q. What I am trying to ascertain is, whether there was anything burning in the bottom of this box?

A. Yes, sir; it was burning. I do not know whether it was in the bottom, it was smoking. I do not know whether it was in the bottom or the top, but I know there was a fire that made a smoke.

By Mr. EARHART:

Q. You made fires in the month of June?

A. Well, April and May.

Q. Why do you not answer my question? Did you make any fires in the month of June?

A. Yes, sir; I think fires were made in June. We lighted fires all along to dry the vault, for a couple of months.

Q. Did you make fires in June?

A. Yes, sir.

Q. Was not that June a particularly warm month?

A. Yes, sir; I know June is warm, it is the first summer month, and it is bound to be warm.

Q. You positively swear that before this fire took place in that vault in the month of June, you made fires in that room?

A. Yes, sir; there was fire kept there three months.

Q. You made it in the month of June?

A. Yes, sir.

Q. How long before this fire in the vault took place, did you make fire in the cashier's office?

A. I cannot tell the date, I know there were fires made all along to dry the vault.

Q. Did you make *on* (one) that Saturday?

A. I do not know, maybe Friday or Saturday.

Q. This was a great event, can you not remember whether you made the fire then, or not?

A. No, sir; no fire ever occurred in the mint then.

Q. Do you speak of the grate in the cashier's office, did you make fire there?

A. Well, we had to dry the vault out.

Q. In the cashier's room?

A. They painted all the rooms. I consider that the cashier's office.

Q. Dry a steel vault?

A. Well, there was paint where the fire was. Of course, I do not know about a steel vault, but I know the fire was there.

109 Q. This vault was in the rear part of his office?

A. Yes, sir.

Q. When was the last time you made fire in June?

A. I do not know, I know fires were kept during these months.

Q. Where did you get the kindling wood?

A. I told you just now where I got it; I got it downstairs, out in the yard; I do not know just particular where I got it that day, but we had kindling wood always in the mint.

Q. You did not go into the vault to get it?

A. No, sir; I did not go to the vault that day, because I brought up some kindling.

Q. How do you remember you brought up some that day; a little while ago you said you did not know whether you made a fire at all?

A. I do not know the day it was; it was about that time; it was kept up for three or four months.

Q. You do not know whether you went into the vault for the kindling wood or got it downstairs?

A. Yes, sir; I carried the kindling up, because I remember the last time I made a fire up there, Johnson had made the fire and I think it went out and Mr. Dowling rung me up to come up and start the fire, and I brought up some kindling; it was during that week, I know. I chunked the fire and did not use it all, and dropped the rest. I do not remember cleaning out, because once a week I would take the waste out. I know I had not cleaned the vault out, because we generally cleaned it out on Monday; we had a great deal of paper on Saturdays sure.

Q. This kindling wood that you had remaining over, what did you do with that?

A. I just said I had some over and threw it into the waste box.

Q. You went into the cashier's vault and threw the kindling wood in his box?

A. In the waste box.

Q. In this box here? (Pointing to the box before the jury.)

A. Yes, sir; in the waste, where we kept the waste.

Q. What do you mean by waste?

A. Where we threw the waste paper.

Q. Do you say you are the man that took the kindling wood, and went into his vault and put it into this box?

A. I suppose that is the box where we kept the waste paper.

Q. I am not talking about where you kept the waste paper, but where you threw the kindling wood?

A. Yes, sir; where we threw the waste.

Q. Where did you throw the kindling wood after you had made the fire?

A. Threw it into the cashier's box.

Q. Was it outside, or inside?

A. Sometimes it was outside and sometimes inside.

Q. I am speaking of this particular time, the last time?

110 A. I do not know about the last time, I know he used that box as a waste box.

Q. It is a very important matter to know whether you threw this wood in his box, out in his office, or whether you went into his vault?

A. I did not go into the vault to throw it, it was in the office. The vault was very near the office like that (pointing with his hand), the waste box would be there; then we would put it back evenings when we would close up; but this was used sometimes near the vault door, where Mr. Dowling would throw his waste. If I had waste myself I would throw it there.

By the COURT:

Q. The district attorney wants to know this: Suppose you had more kindling wood than you needed, and this box which you call a waste box was in the cashier's vault, would you walk into the cashier's vault and throw that kindling into that box?

A. Yes, sir; I would throw any waste I had into it, whether it was kindling or not, sometimes we put the box outside.

Q. But what would your course be when this box was in the vault?

A. I would go in there and throw it into the box, I had access to it the same as Mr. Dowling had.

By Mr. EARHART:

Q. Was Mr. Dowling there when you threw this waste into the box in the vault?

A. Well, he was in the office, of course, because I would not go in around there unless he was there, I waited on him. I would go and get money. He would say, "Get me some gold or silver," or he would say, take this in. I was his man. Sometimes he left the vault open, and I would lie down and go to sleep if I liked.

Q. You were working there?

A. Yes, sir.

Q. What employment?

A. Regular cashier's man.

Q. Were you a sworn officer, had you an appointment from Dr. Smythe?

A. Yes, sir.

Q. You were sworn as an officer?

A. Yes, sir; I took the oath.

Q. You got a salary from the Government?

A. Yes, sir.

Q. You were known in the mint as a workman, or a laborer?

A. They were known as workmen, I was carried on the roll as a workman.

Q. Then you say, as a workman in the employ of Dr. Smythe,

you would take kindling wood out of the *fron* (front) office,
111 the cashier's office, and go into his vault, the cashier's vault, and throw kindling wood in that box?

A. I would throw waste.

Q. I am not talking about waste, but about kindling wood?

A. Well, I do not think kindling wood was going to be so important. I did not look upon it any more than waste paper. Anything I had I put into that box, because it was my duty to carry it out, I did not know it was going to play so important a part, or I would not have placed it there.

Q. Then after you made the fire, and had some kindling wood over, you considered it waste. You took that waste and went into the cashier's vault and threw it into his box?

Q. Stand up and look into this box. Did you throw all your kindling wood in that as waste?

A. Well, not all at one time, occasionally I had a good bundle, for I had to take a great deal to start fires, I do not know how much. I know I put it in there because it was my duty to take it out.

Q. And that was in the box after the fire?

A. Well, I do not know.

Q. Did you put all that in there?

A. I do not know about throwing all of that in there at one time.

Q. Did anybody else have an opportunity of throwing in any?

A. Johnson sometimes would put waste there.

Q. I am not talking about waste, but pine kindling.

A. Yes, sir; he would put anything there that he wanted, he had access to the office.

Q. Did you ever see him do it?

A. I guess I have, because it was his duty to make fires; it was not my duty to make fires, only to wait on the cashier, and carry the money in or out. He wanted to dry the vault during these months, and I would look upon Mr. Dowling as delicate.

Q. You knew this box was in the cashier's vault, and you sometimes used to throw pine wood into it?

A. Yes, sir.

Q. That is true?

A. Yes, sir.

Q. And you say this cashier put the tin box on the wooden box you testified to that two or three times?

A. Yes, sir.

Q. Did you ever go to the cashier and tell him not to put that tin box there?

A. I never told him not to do nothing; I never did in my life, and it was not my duty to dictate to him because he was my superior.

Q. Did you tell him that you had been putting pine wood into that box?

A. We used that box for waste in everything that was left over.

Q. That is not the question. If you had been putting this fine kindling wood into this box, and you seen the cashier putting money

on this box two or three times, did you tell him that under
112 this box was a lot of kindling wood that you put there?

A. I just stated that I did not know pine wood was going to play an important part. If I went there and saw another cashier that way, I would tell him.

Q. I am not talking about another cashier, but Mr. Dowling?

A. No, sir; I do not say him.

Q. You went into that vault when you wanted?

A. I went in there when Mr. Dowling was there.

Q. When you went in there to throw the kindling wood in the box, he was there?

A. I did not go to throw kindling wood especially, but any waste I had to throw, I threw it in.

Q. You waited until he was away before you threw it in?

A. No, sir; he was there attending to his business, and writing, and if I had any waste, I would throw it in that box the same as he did.

Q. Did you see matches in that vault?

A. Yes, sir; there were matches.

Q. On the shelving?

A. Yes, sir; I think we kept matches in there to light the lamp.

Q. You saw candles?

A. Yes, sir; we had a candle; we used candles in there to seal the wax. Mr. Dowling used it invariably to seal up money in bags, and of course we had matches, and we would light the candle and hold the wax to it. I used to do it myself. I would light the candle and hold it right in the wax until it run, and then used the stencil.

Q. You saw all that, you saw the coal-oil lamp?

A. Yes, sir.

Q. And after you saw that, you brought in some kindling wood to put in this box, that is what you did, answer yes or no?

A. I said that kindling wood got in because it was used as waste. I did not do it directly, I did not go to put it in there because I wanted to.

Q. How did it get in there?

A. It got in there when I had more than I wanted.

Q. You put it in there?

A. Yes, sir; I put it in there.

Q. What kind of smoke was coming out of that vault that day?

A. I do not know, smoke, it was pretty severe smoke, I do not know what kind, I am not well up on smoke.

Q. You are an expert on fires?

A. Yes, sir.

Q. What kind of smoke was coming out of there?

A. I do not know.

Q. What was the condition of the vault after the fire?

A. Well, it was all—the box was charred, and some glass broken. I think the coal-oil lamp, the globe of that lamp was broken and one, or two of them small jets as they call them was broken. It was in such a condition that we knew there was a fire.

113 Q. Was there any black soot there?

A. Well, it was in pretty bad condition; there was indications that there was a fire, the mint officials were very much worried and Dowling looked as if he was crazy.

Q. Was not the smoke so dense that you put on an electric fan?

A. I do not know that I put it on, but I know that the electric fan was put on and used.

Q. Did you not put the electric fan on?

A. Possibly I may, I do not know. I recall that I pulled Mr. Dowling away; he was exhausted, and I pulled him back; the smoke was so great that we could not get in, and then some one suggested that we start the fan. After the fan was started the smoke went out.

By Mr. SPENCER:

Q. You talk about drying this vault. Did that vault sweat any in damp weather?

A. Yes, sir; it was damp.

Q. What was the reason of asking you to light a fire?

A. Well, it was damp and sweaty, paint and all.

The defendants here close their case, with the exception of offering one piece of documentary evidence, which may or may not be offered hereafter.

A 9. PAT CREAGH, sworn for the plaintiff in rebuttal, says:

By Mr. EARHART:

Q. You were employed in the United States mint at the time of the fire that took place in June, 1893?

A. Yes, sir.

Q. When Dr. Smythe was superintendent?

A. Yes, sir; I was.

Q. When Mr. James M. Dowling was cashier?

A. Yes, sir.

Q. And when Douglas Burrell was a workman in the mint?

A. Yes, sir.

Q. Do you know anything about the making of fires, in the mint, in the grates of the different offices?

A. What time?

Q. During the month of June, 1893?

A. No, sir.

Q. Did you ever see any?

A. I never saw a fire during the month of June there.

Q. Had you occasion to go outside of the cashier's office daily?

A. My business was to transact business with the cashier; I was shipping clerk.

114 Q. You lived in this city nearly all your life?

A. Fifty-two years.

Q. Had a fire been made in the cashier's office in the mint, in the month of June, would you have observed it?

A. Undoubtedly I would.

Q. Why?

A. Because there was no need for a fire, it was too hot in there anyhow in the month of June.

Q. Did you see this box at all, the burned wooden box at the time of the fire?

A. I saw it after it was brought out.

Q. When it was brought out where did you first see it?

A. I saw it down in the yard.

Q. Whereabouts in the yard?

A. On a pile of trash that was there.

Q. What they call the ash pile?

A. Yes, sir.

Q. That is at the rear of the mint grounds?

A. Yes, sir.

Q. What is the name of the street that runs back there, the mint square?

A. Barracks street.

Q. How close to the Barracks Street railing was that ash *ash* pile?

A. Well, sometimes 10 feet, sometimes there is a large pile there. The ash pile is piled up against the railing almost.

Q. The cashier's office is in the front part of the mint, on Esplanade street?

A. Yes, sir.

Q. It is going in the right hand, and is the left-hand entrance coming out on Esplanade street?

A. Yes, sir.

Q. Then, as I understand you, the distance from the front office, which is the cashier's office, in front of the mint, to Barracks street where this ash pile was, is the whole depth of the mint building and the back yard?

A. The depth of it from the front of the building to the back at Barracks street.

Q. How many feet do you think it is?

A. I never measured it; it is a good many feet.

Q. Is it 100 yards?

A. I do not know.

Q. You do not know how far it is?

A. No, sir.

Q. That is the first time you saw that box that day, when it was thrown on the ash pile?

A. Yes, sir; I saw that box in the cashier's office before it was charred and burned.

Q. You saw it the day of the fire?

A. Yes, sir; that is the first time I saw it that day, on the ash pile.

Q. Did you see what was done to the box on the ash pile?

A. It was thrown on the ash pile and there was small pine splinters in it, kind of burned.

Q. Did you see who had the box then?

A. At the time I saw it, Dr. Smythe and a lot of them, I do not know who, were looking at the box.

115 Q. Was Mr. Dowling there then?

A. I do not know where Mr. Dowling was at the time. When Mr. Dowling came in he opened the vault.

Q. That is the last time you saw that box then?

A. No, sir; I saw it since in the mint, when the Government employés were coming down to investigate.

Cross-examined by Mr. GRANT:

Q. In what condition was the box when you saw it on the ash pile?

A. Well, it was thrown there, the condition something like it is now, open.

Q. Was it there with its contents in it, or were the present contents in the box then?

A. There was a lot of trash in the box, I do not know what it was, some pine splinters.

Q. These present contents, were they in the box when you saw it?

A. Those things here (pointing to the wooden box before the jury)?

Q. Yes.

A. I think so, I cannot positively say that these are the things that I saw there then.

Q. How long did you stay there at the ash pile?

A. At that fire?

Q. Yes.

A. A few minutes, that is all.

Q. How long was the box there?

A. Not long.

Q. How long?

A. I do not know, they had it taken upstairs immediately.

Q. Do you know that there was a fire built, or no fire built, in the cashier's office in June, 1893?

A. Well, I never saw any if there was.

Q. So when you do not see a thing you imagine it is not there?

A. Well, I went in there very often during the day, that is the front office, I mean the front office. The office of the cashier is outside of the vault, with a door leading into the vault, and if there was a fire inside there, I could not help seeing it.

Q. Where was your office?

A. My office was around there, I always was in the office in front of the cashier at the left-hand side.

Q. The outside of the hall?

A. Yes, sir; the left-hand side of the hall as you go in. I was on the left-hand side and the cashier was on the right-hand side.

Q. What was your business in the mint?

A. Shipping clerk.

Q. Where did your duty keep you during the time you were shipping clerk?

A. I do not understand you.

116 Q. Where did you go to perform your duties?

A. Where did I go, around shipping?

Q. Yes.

A. I would come in and get an order from the cashier, he would mark the bags or boxes, and give them to me, and I would ship them to the different steamboats or express offices.

Q. So that carried you around to the different points where they were shipped?

A. I had wagons, express wagons.

Q. And you followed them up?

A. Yes, sir; I followed them all the time.

Q. So you were mostly outside?

A. Yes, sir; during the shipping.

Q. During the day, how long would you be absent from your office in the mint?

A. Well, about eleven o'clock in the day I would come up here to the subtreasurer's office in the custom-house, to get orders for shipping. I would get the orders there. I would be absent perhaps an hour, and go back and give them to the cashier, and the cashier would ship the quantity that he had orders for. When he would have them marked, he would give them to me, and I would get the express wagons to take them wherever they were going.

Q. It took you a good while to do that?

A. I was still in the mint after I got back, until I got charge of the money to ship.

Q. What were your hours in your office in the mint?

A. I came in the morning with the mail, generally about nine, or half past nine, as soon as the Louisville & Nashville train got in. Then I would stay there, unless I got some other message to go out with some shipping, until about 11 o'clock. Then I would come up to the subtreasury to get the orders to ship.

Q. So the truth is, you did not go into the cashier's office, except on occasions when you had orders to ship?

A. My duties were in the mint and outside of the mint, I was in and out.

Q. Mostly out?

A. No, sir; I spent more of my time in, sometimes I would go out at three o'clock and not come back any more.

By Mr. EARHART:

Q. You say that you were shipping clerk and that your duties were to ship, where did you get the money to ship?

A. From the cashier.

Q. How and where did you get it?

A. How did I get it?

Q. How and where, in what office did you get it?

A. I brought orders to the cashier.

117 Q. In whose office?

A. In the cashier's office and he entered them.

Q. When you say cashier, what cashier do you mean?

A. The cashier of the mint.

Q. What was his name?

A. Mr. Dowling. When he entered these orders the money was downstairs, and we went down and he marked the money wherever it was going to different parts of the country. I took charge of the money then.

Q. Now every time you made shipments, you were compelled to go to the cashier?

A. I had to report to the cashier.

Q. You found him in his office?

A. Yes, sir.

Q. After you made the shipments where would you go then?

A. I might come back to the mint if it was not too late.

Q. Did you ever report the result of your work?

A. Certainly I did.

Q. To whom?

A. I had a book, a receipt book, and got receipts for all my shipments and brought back the receipts to the cashier.

Q. Where would you bring them to the cashier, in what office?

A. In the cashier's office.

Q. Did you ever do any of that work during the month of June, 1893?

A. Yes, sir.

Q. Then daily, you were in and out of the cashier's office during the month of June, 1893?

A. Yes, sir; I was.

Q. Now, during the time that you were making these shipments, and making returns of these shipments to the cashier, did you see any fire?

A. No, sir.

A 10. FRANK GEE, sworn on behalf of the plaintiff in rebuttal, says:

By Mr. EARHART:

Q. What position did you hold in the United States mint during the year 1893?

A. Warrant clerk.

Q. Did you know Cashier Dowling?

A. Yes, sir.

Q. Did you know Andrew W. Smythe, superintendent of the mint?

A. Yes, sir.

Q. Were you employed by him as warrant clerk of the mint?

A. Yes, sir.

Q. At the time Mr. Dowling was cashier?

A. Yes, sir.

Q. Do you know where Mr. Dowling's office was at that time, in the mint? What part of the mint?

A. Yes, sir.

Q. Where?

A. Where was the office located?

Q. Where was his office, what part of the mint?

118 A. It was on the second floor, to the right of the main entrance on Esplanade street.

Q. The right of the entrance going in and the left going out?

A. Yes, sir.

Q. I understand you, it was the first office?

A. Yes, sir; the first office on the second floor.

Q. As you entered the building from Esplanade street?

A. Yes, sir.

Q. Did you have occasion to go in that office on Monday, June 26th, 1893, in the morning?

A. Yes, sir; I was in the office, I stepped into the office.

Q. What did you go there for?

A. I do not remember what occasion I went in there for, but I was in the office during the day, off and on quite often, my duty was to take the warrants to the cashier.

Q. Did anything happen in the mint that morning?

A. Yes, sir; I believe there was a little fire discovered in the new vault.

Q. You believe it?

A. Yes, sir; I know it.

Q. Did you see that vault that morning?

A. Yes, sir.

Q. Did you go in that vault?

A. I went to the door of the vault only.

Q. Whom did you go with?

A. I did not go with anybody, I stepped around in there to look.

Q. Did you see anybody there when you went to the door of the vault?

A. Mr. Dowling was there.

Q. Where was he?

A. In the vault, at the door of the vault.

Q. How did it happen that you came to the office, came to the door of the vault that morning? Please state it to the jury.

A. I do not remember what the occasion was that caused me to go into the office that morning, but I happened to step in there, and at that time they had opened the vault, a few minutes before that.

Q. Who opened it?

A. Mr. Dowling.

Q. While you were there?

A. No, sir; probably five minutes before I entered the vault he had opened the vault.

Q. Then what happened?

A. Well, there was considerable smoke coming out of there and quite a little bit of excitement, and of course Mr. Dowling was there very much exhausted and very much excited, and was attempting to get some things out of the vault, and I assisted him, especially to carry out a box.

Q. Which box?

A. A wooden box.

Q. Did you see any other box brought out?

A. I saw a box that had been brought out.

119 Q. What was that?

A. A tin box, a cash box.

Q. You assisted him in bringing out another box?

A. Yes, sir.

Q. Did you go into the vault and get it?

A. At the door of the vault; yes, sir. It was simply at the door because Mr. Dowling had already gotten it out as far as the door of the vault, and then I took hold of it with him.

Q. He had already gotten it out to the door of the vault?

A. Yes, sir.

Q. What happened then?

A. We carried the box down to the ash pile was the next thing, so far as I know.

Q. Did he ask you to help him to carry it?

A. I do not know that he asked me to take hold of it, but he asked me after I got out into the passageway, he asked me if I would take it down back with him to the yard.

Q. What did you say?

A. I protested about carrying it so far as it was not necessary, and he said no, we will carry it to the back part.

Q. Did you protest?

A. I said I did not think it was necessary to carry it out there; that somebody else could carry it out there if necessary, that is all I recollect having occurred.

Q. But you helped him to carry it to the ash pile?

A. Yes, sir; I did.

Q. When you got to the ash pile what did you do?

A. Dumped it over on the ash pile.

Q. What did he say or do?

A. I do not know what the remark was at that time, in particular now. I know he threw it over upside down on the ash pile.

Q. What did he do to it with his foot or hand?

A. He gave it a kick like that. We threw it over, as it was, to where he gave it a kick with his foot, and shoved it around that way with his hand.

Q. Can you not testify what he said at the time he kicked that box?

A. Well, I cannot recall the words now, at this time. Of course, my memory at that time was very fresh, but it is some time since then and I do not remember the exact words.

Q. Did I understand you a little while ago to testify that he said something, but you could not remember just now?

A. He made a remark at the ash pile. Do you refer to the ash pile?

Q. Yes.

A. Well, I cannot now remember any particular remark that he made at the ash pile, he may have made a remark, but I cannot recall it.

Q. Did he make any remark about the box, from the time you helped him to carry it out until you got to the ash pile?

120 A. The only remark that I remember now was on my protesting to carry the box out there, and Mr. Dowling insisted upon taking it and me helping him to carry it out there to the back of the mint yard.

Q. Can you tell the jury how far it is from the cashier's office that fronts on Esplanade street back to where this ash pile was?

A. Well, it is down one flight of stairs on to the ground floor, then back to the width of the building back some 20 or 30 feet beyond the building. It is half way between the building and the fence on Barracks street. I do not know how many feet it would be, but it is quite a little distance.

Q. You were in that mint a good many years?

A. Yes, sir; quite a number of years.

Q. The front part of the mint fronts on Esplanade street?

A. Yes, sir.

Q. The rear part fronts on what street?

A. I believe it is Barracks street.

Q. Do you not know?

A. Barracks street is the name as near as I can recollect.

Q. How far is that ash pile back from the fence on Barracks street?

A. Between 30 and 40 feet, possibly not so far as that. I cannot remember the exact number of feet, but in that neighborhood, say between 20 and 30 feet; it is quite a little extent.

Q. What kind of a fence is back there, is it an iron-railing fence?

A. An iron-railing fence.

Q. Now, how close to that railing fence was that ash pile, was it not right up against it?

A. No sir; I do not think it was, if I remember right. It is some little distance from the fence to the center of the ash pile, probably as far as from here to that railing (30 feet).

Q. Is there any old building stands there about as far back as the end of the fence to that railing?

A. Well, that is the pump-house, and the boiler to the right of that is the old building.

Q. What I am trying to get at is, how far you had to go with that box—the distance?

A. Supposing from Esplanade, $\frac{2}{3}$ or $\frac{3}{4}$ of the way to Barracks street, I do not know how far that would be.

Q. Did you go back to the office after you carried it out?

A. Yes, sir; after we had deposited the box on the ash pile we returned to the office.

Q. You left the box there?

A. Yes, sir; after the contents had been thrown out. We turned the box upside down. After we threw the box there on the ash pile we turned the box upside down.

121 Q. You say "we"?

A. Yes, sir; Mr. Dowling and myself, he had one end of it and I had the other and we both turned it.

Q. I thought you said he turned it with his foot?

A. He kicked it with his foot and after it was turned over, he gave it a shove with his hand that way (motioning).

By the COURT:

Q. What were the contents, try and describe them?

A. Burned paper, charred kindling wood, and trash of one kind or another. I noticed there was some little—what made me look at it more particularly was, I thought some of our marking brushes were there, and I picked up some of the wood that was in the box. I thought it was some of our brushes and I found it was pine wood. That is all the discovery or notice I made. Some little fat pine, that is all I did, but I picked it up to look at it, because among the trash it looked like brushes.

Q. Was there some paper that was not consumed?

A. In the box?

Q. Yes.

A. Yes, sir; there may have been some paper not entirely consumed.

By Mr. EARHART:

Q. Did you go back to the office with Mr. Dowling?

A. I believe so; yes, sir.

Q. Did you see this tin box on the floor that he had brought out?

A. I saw a tin box, but I do not remember whether it was on the floor, or had been lifted up on the shelf, I think that it was on the shelf, somebody had deposited it there.

Q. Did you see the contents?

A. No, sir; I looked at the box, it was on the shelf. I stepped up and looked at it but not into it.

Q. Can you tell the jury what you saw about this box, I cannot put leading questions?

A. You mean the tin box?

Q. Yes.

A. Well, I saw it was pretty badly scorched or burned, the heat had unsoldered it, and part of the side had fallen in, but I did not look into it carefully.

Q. Did you look into it not very carefully?

A. From my position, I could not say what the contents of the box were; if I remember rightly, I simply saw the box there and saw the condition it was in.

Q. Did you look into the vault afterwards?

A. I looked into the vault afterwards, simply, but did not go into the vault at all. I do not think I went into the vault at all; no, sir.

Q. Did you see any lights in the vault?

122 A. Well, I think there was a light burning, or had been burning. When I first went into the vault I think there was a light burning. I do not remember now, but I think one of the electric lights were burning. At the time we took the box away from there I think it was burning.

Q. Did you see a safe there at the end of the vault?
A. Yes, sir; there was a safe there.
Q. As warrant clerk, did you have occasion to go to that cashier's vault very often?
A. Yes, sir; it was my duty to take the warrants down to the cashier, and leave them with him for payment.
Q. How often?
A. Well, sometimes several times a day, sometimes not so often. It depended upon the number of warrants paid here.
Q. You went there every day?
A. Yes, sir.
Q. Of course, you must have gone there in the month of June, 1893?
A. Yes, sir.
Q. Did you ever see any fire in that office, in June, 1893?
A. No, sir; I never saw any fire there.
Q. Did you ever see this wooden box before that day, before you helped to carry it out of the vault?
A. Yes, sir; very often.
Q. In the vault?
A. Yes, sir.
Q. You saw it in the vault?
A. Yes, sir.
Q. With this kindling wood in it?
A. I do not know what was in the box, waste paper or something; it was sitting on the left-hand side, next to the wall of the vault. I had been employed in the cashier's office and knew the location of it and the box, previous to my being warrant clerk.
Q. Then you know it is the same box that you had seen there previously, that you had helped to carry out and turn over on the ash pile, that this kindling, pine wood and all the debris came out of?
A. Yes, sir.
Q. You are sure it is the same box?
A. Yes, sir.

No cross-examination.

A. G. F. MUNIER, sworn for the plaintiff in rebuttal, says:

By Mr. EARHART:

Q. You were employed in the United States mint during the administration of Dr. A. W. Smyth, in June, 1893?
A. I was.
Q. When Dr. Smyth was superintendent and James M. Dowling was cashier?
A. Yes, sir.
123 Q. Were you there so employed in that mint on the morning of Monday, June 26th, 1893, when there was a fire discovered in the cashier's vault?
A. Yes, sir; I was.
Q. Did you go to that vault?

A. I arrived there about 10 or 15 minutes after the vault had been opened.

Q. Will you state to the jury what you saw?

A. When I arrived there I found that my superior officer, Mr. Clawson, was in the cashier's vault, and I think he called me in and told me to watch a tin bank box that was on the floor, while he went out and had a wooden packing case made to fit it, and when the packing case arrived he and I put it in and we tied it up with cord, sealed it up and turned it over to Mr. Dowling.

Q. By whose order was that done?

A. I was under the impression that it was Dr. Smythe's.

Q. Certainly somebody must have ordered you, a subordinate officer of the mint, to do that?

A. Well, Mr. Clawson was my superior officer at that time.

Q. Was Dr. Smyth there?

A. I think he was in the building; he was not in the cashier's vault.

Q. Was he there when you put the tin box into this wooden box?

A. No, sir; not to my recollection.

Q. Before you put this tin bank box into the wooden box, what was its condition?

A. Well, it had been unsoldered at the corners by the heat, the handle had been melted off, and I think the hinges, pretty badly charred.

Q. Did you look at the contents of the box?

A. I did.

Q. What did you see?

A. On the right-hand corner, a great many of the bills that had been totally destroyed, and on the left-hand side there were some that had been charred around the edges; the bills were in bundles.

Q. So you found some charred on the edges and some you saw badly charred on the other side of the box?

A. Yes, sir.

Q. Did you find any bills in any other condition?

A. I cannot say, because I did not touch any of them; I looked at them as far as I could down the side of the box.

Q. What did you see there?

A. I saw some packages were badly charred all around the edges.

Q. You told us that.

A. Well, then, that is all.

Q. You told us of some badly burned?

A. Yes, sir.

Q. And some of them not?

A. I said some badly burned and some partly all around the edges, that is the original packages, the packages had been charred all around the edges, extending into the center a considerable distance.

Q. Did you see any other kind of bills, except badly
124 charred, and those charred around the edges?

A. Not that I noticed.

Q. Did you notice?
A. No, sir.
Q. Did you put your hand on the box?
A. Well, I put my hand on the box; yes, sir.
Q. Did you put your hand on the money?
A. Well, I am not positive, I may have done it, but I do not swear to it.
Q. Can you tell this jury, from your recollection of it, how thick these packages were, which you say were not badly burned?
A. Well they were — in- or about half an inch thick.
Q. Of those that were badly charred?
A. That I could not state.
Q. How thick were those?
A. That I could not state at all.
Q. Could you give an idea of the height and depth of that bank box, the top of the box?
A. I suppose about four inches.
Q. Was it full?
A. No, sir; about ⅔ full.
Q. Of this charred money?
A. Yes, sir.
Q. Could you see the denominations of any of this money?
A. That I do not recollect.
Q. When you put it into this wooden box, who brought this wooden box to you—not this wooden box here in court, but the new wooden box?
A. The carpenter that made it.
Q. Do you remember the carpenter?
A. I cannot remember his name, but I think a man by the name of Schuppert.
Q. After you put that tin box and all that money in there, how did you close that wooden box?
A. With a cord.
Q. Then what did you do with the wooden box?
A. I think I carried it into the vault and put it down in the vault; that is my impression.
Q. Where was Mr. Dowling then?
A. Right there.
Q. You did not seal up that box?
A. To my positive knowledge, we did not; we may have, but it is not to my knowledge that we did.
Q. Do you know how long it remained in the custody of Mr. Dowling?
A. No, sir.
Q. Were you there when it was opened and delivered to the experts?
A. No, sir.
Q. You say you had to go into that office every day—I do not know whether I asked you the question, or not, I believe I did; did you ever see any fire in the cashier's office in the month of June?

A. Not to my recollection, but a small matter like that I would not pay attention to.

Q. Would you have noticed it if it had been there?

125 Mr. Spencer for the defendants objects to the form of the question.

By the COURT:

Q. Did you see any fire in the cashier's office in the month of June, 1893?

A. Not to my recollection; there might have been fire, but I would not pay any attention to it.

Q. That is not the question, did you see any?

A. No, sir; I cannot say that I did, to my positive knowledge.

By Mr. SPENCER: Can you say that you did not see any?

A. I cannot.

By Mr. EARHART:

Q. In the cashier's office?

A. I cannot say that I did see any, or that I did not see any.

A 8 *bis*. FRANK C. MINOR recalled for the plaintiff in rebuttal:

By Mr. EARHART:

Q. You have already been sworn?

A. Yes, sir.

Q. You were the book-keeper of Dr. Smyth at the time of this fire in June, 1893?

A. Yes, sir.

Q. Where was Dr. Smyth's office at that time?

A. The second room on the left-hand side as you enter, passing through a reception-room, you reach his office.

Q. Where was the cashier's office?

A. On the right-hand side as you go in, the first room.

Q. As you go out of the door of the cashier's office, in what direction would you have to go to the door of the superintendent's office?

A. Across the hall.

Q. Across the hall on a straight line?

A. Yes, sir.

Q. Then, as I understand you, the superintendent's office was directly opposite the cashier's office?

A. Yes, sir; one room intervening.

Q. Where was your office?

A. Upstairs on the gallery, on the river side.

Q. Did you have occasion to go into the cashier's office?

A. Frequently.

Q. Do you remember ever going in there during the month of June, 1893?

A. Yes, sir; I went in there very often, every day.

126 Q. Do you know anything about any fires being made in that room?

A. I never saw a fire there during the month of June.

Q. Do you know why?
A. Because it was one of the most extraordinary hot Junes ever known in this city.
Q. Did you see the tin box that was brought out of the vault?
A. Yes, sir.
Q. Did you see where it was laid?
A. On the floor, just outside the vault.
Q. On the floor of what?
A. Of the cashier's office.
Q. On the floor of the cashier's office?
A. Yes, sir.
Q. Did you see how much money was in it?
A. No, sir; it was a dark corner and I did not see the money at all; I just saw the box all broken to pieces.
Q. Do you know what became of that box?
A. Yes, sir; it is here in court.
Q. But that day when you saw it there?
A. Yes, sir; I know it was put into a wooden box and tied up.
Q. Were you present there?
A. Yes, sir; several persons were present.
Q. To whom was that box delivered, after it was put in the wooden box and tied up?
A. I do not know to whom it was delivered; I was not attending to the job, I was simply looking around.
Q. Do you know what became of the wooden box that contained this tin box with the money in?
A. Yes, sir; I saw it afterwards.
Q. Did you see it that day after Dowling took charge of it?
A. No, sir.
Q. The last time you saw it, it was still in the cashier's office?
A. Well, that is a very vague question, the last time I saw it, it was Thursday, here.
Q. I mean that day the 26th of June?
A. I said it was in the cashier's vault; the last time I saw it, it was in the cashier's vault.
Q. Did you see it put into the cashier's vault?
A. Yes, sir; I saw it put into the cashier's vault.
Q. Was the cashier present?
A. Yes, sir.
Q. When it was put into the cashier's vault?
A. Yes, sir.
Q. Did you see this wooden box, the burned box?
A. A long time after the trouble happened, I saw that box.
Q. How long afterwards?
A. Several hours.
Q. Where did you see it?
A. I saw it in the store-room of the mint.
127 Q. Had you ever seen it before?
A. No, sir; I do not recollect it before at all.
Q. When you saw it in the store-room, who had charge of it?

A. The superintendent had charge of that room, but there was a store-room known as W. S. Kennedy's.
Q. You say there was a gentleman named Kennedy?
A. Yes, sir.
Q. You say you were book-keeper of the mint?
A. Yes, sir.
Q. What time do the counting officers usually come here to count the money in the mint?
A. Some get there at 8, half past 8; 9 and half past nine.
Q. I mean the annual count at the end of the year?
A. The 30th of June, the end of the fiscal year.
Q. Then on the 30th of June every fiscal year, the officers come from Washington—what do you call them?
A. Examiners.
Q. To count the cashier's vault and everybody else's vault?
A. Yes, sir.
Q. How long after this fire did they get there?
A. Two or three days.
Q. It was the end of the fiscal year?
A. Yes, sir.

Cross-examined by Mr. SPENCER:

Q. Did the officers come at any other time, than at this annual investigation at the end of the fiscal year?
A. Yes, sir; they came at the change of superintendents.
Q. Did they ever come to your knowledge?
A. No, sir.
Q. Do you know the counting officers come at any other time?
A. Yes. sir; they were liable to come at any time.
Q. This annual count is made every year?
A. Yes, sir.
Q. *This annual count is made every year?*
A. *Yes, sir.*
Q. Does not the Government make it a practice of dropping in on its officers to find out how they stand?
A. So I understood, they done it while I was in the mint but I understood that happened several times before.
Q. They never knew when to expect them?
A. No, sir; except at the end of the fiscal year.
Q. Then they knew they were coming then?
A. Yes, sir.
Q. Did you ever see the contents of that box at any time?
A. Yes, sir.
Q. How much was there?
A. Well, as I said in my previous testimony, I do not know, I never measured it.
128 Q. How much apparently?
A. Well, there may have been a teacup full or less.
Q. Did you see this box after the fire?
A. Some times after the fire, several hours.

Q. You say you never saw it before the fire?
A. No, sir; I never saw it before the fire.
Q. Yet you were in the cashier's office constantly?
A. Yes, sir.
Q. And never saw it?
A. I do not remember seeing it.
Q. Did you pay attention going into the cashier's vault?
A. Well, I studied everything in the mint. I studied the mint from top to bottom.
Q. And yet you never saw this fire that all the witnesses speak of?
A. I never remember seeing that fire.
Q. Did you keep the weather records of the Government?
A. No, sir.
Q. How was the temperature in May in that vault?
A. I do not remember that.
Q. How was it in April?
A. I do not know.
Q. You do not remember that?
A. No, sir.
Q. How was the temperature there in January?
A. I do not recollect, but I do recollect in June.
Q. That, of course, is fixed in your memory?
A. Yes, sir.
Q. Did you ever hear of the steel vault getting damp?
A. Not in that mint, except one vault that is in the mint.
Q. Did you ever hear of the steel vault getting damp?
A. No, sir; I never did.
Q. You never heard of it being damp on a sultry day, where there is any moisture in the air, and the steel vault accumulated moisture?
A. I do not know.
Q. You do not know that damp is precipitated on cold substances?
A. Well, I do not know, not to the extent it did damage or not.
Q. Did you ever notice the door of the vault, to notice whether the paint was in any way defaced or disfigured by moisture?
A. In this particular vault?
Q. Yes.
A. I have been in that vault thousands of times and never saw anything disfigured by dampness.
Q. You never saw any evidence of moisture at all?
A. No, sir.
Q. Your mind is now as fresh on that matter, as it was at the time when you testified last?
A. I cannot say.
Q. You testified in the previous case about these matters?
A. Yes, sir; in the Dowling case.
Q. What case was that?
A. The Dowling case.
Q. But what case was it?

129 A. It was a case wherein he was charged with embezzlement, or being short in his accounts.

Q. He was charged with having embezzled this same $25,000?

A. Yes, sir.

Q. You testified as a witness for the Government in that case?

A. Yes, sir.

Q. Do you remember your testimony in regard to that case; in regard to the ashes?

A. I do distinctly.

Q. What was your testimony on that subject?

A. Well, I did not measure those ashes, whether it may be a cartload or a teacup full, or less.

By Mr. EARHART:

Q. You say Mr. Dowling was charged with the embezzlement of this money?

A. Yes, sir.

Q. He was acquitted of that charge of embezzlement?

A. Yes, sir.

Q. Was he not charged with another offense also?

Mr. McCaleb objects on the ground that the indictment itself is the best evidence.

The COURT: If the objection had been made to the evidence of the formal trial of embezzlement, I would have ruled it out, because the present case has no connection with the criminal trial.

Mr. MCCALEB: I make the point that the record of the indictment is the best evidence.

The COURT: I do not think that the record of the criminal trial has anything to do with this case.

Mr. EARHART: That is true, but the defendants *has* (have) brought out the matter of the criminal trial.

The COURT: That may properly be, but had the district attorney objected to it, I would have ruled it out. I now exclude the question.

A 12. W. S. KENNEDY, sworn for the plaintiff in rebuttal, says:

By Mr. EARHART:

Q. Were you employed in the mint during June, 1893, when a fire took place in the cashier's office?

A. Yes, sir.

Q. What was your position?

A. I was in the counting department.

Q. Where were you that Monday morning, when that fire was discovered in the vault?

A. I was down in the counting department.

130 Q. Did you know or hear, or see anything of it?

A. I was sent for.

Q. Who sent for you?

A. I do not know, unless it was Mr. Dowling, the party that came down said they wanted me in Mr. Dowling's office.

Q. Do you remember who the party was?
A. I do not know, but I am under the impression that it was Burrell, I do not know exactly.
Q. Did you go there?
A. Yes, sir.
Q. What did you say, hear, or see?
A. I saw a dense smoke there. I saw Mr. Dowling down at his desk coughing very violently when I went in, and I got very much choked up myself and I got out of there as quick as I could.
Q. You got choked up?
A. Yes, sir; choked up very badly.
Q. What choked you?
A. The smoke.
Q. It was the smoke in the cashier's room, or office?
A. Yes, sir.
Q. Before you went out—was that the time you say Mr. Dowling was sitting at the desk coughing?
A. I saw this box down at the side of the office.
Q. What kind of a box?
A. A tin box.
Q. Did you see where it came from?
A. No, sir; I did not see it only as I saw it sitting in the office.
Q. Did you see any other box?
A. No, sir; not at that time.
Q. Did you see this burned wooden box?
A. Aftewards, I did.
Q. Where did you see that one?
A. The first I saw of it was at the foot of the stairs, when Mr. Gee and Mr. Dowling were carrying it out.
Q. You saw Mr. Dowling and Mr. Gee carrying it out?
A. Yes, sir; I met them right at the foot of the stairs as I started to go up.
Q. Did you follow them?
A. Yes, sir; I went on out.
Q. Where did they go?
A. They went out to the ash pile.
Q. And you followed them?
A. Yes, sir.
Q. What did you see them do?
A. They threw the box down and I saw Mr. Dowling kick the cover off.
Q. You saw Dowling kick the cover off?
A. Yes, sir.
Q. When they passed with the box, the cover was closed?
A. Yes, sir; the cover was down.
Q. Then when it was set on the ash heap, you saw Dow-
131 ling kick the cover off?
A. Yes, sir; it was tipped over, I think.
Q. Did he say anything at the time he kicked it?
A. I did not hear it.
Q. What came out of the box?

A. I saw trash, paper and kindling wood.
Q. How was the trash, paper and kindling wood that you saw come out?
A. How did it look to me?
Q. Yes.
A. It looked like trash.
Q. It looked like kindling?
A. Yes, sir.
Q. How did it look to you?
A. It looked like kindling.
Q. What kind of kindling?
A. Pine.
Q. Was there anything the matter with it?
A. Only that it looked to me it was saturated, that is all.
Q. Saturated with what?
A. With water, or something of that kind; there was burned paper there, too.
Q. You saw that box?
A. Yes, sir.
Q. How did that box look to you, this wooden box here?
A. The box looked about the same as it does now.
Q. How does it look now?
A. It looks pretty burned or charred.
Q. You say that was saturated with water, the kindling wood that came out?
A. The kindling wood looked to be wet, as if water was thrown on it or something.
Q. You say they emptied it on the ash pile?
A. Yes, sir.
Q. And you saw Dowling kick the cover off?
A. Yes, sir.
Q. And you saw this stuff get out?
A. Yes, sir.
Q. Now, you tell the jury that the stuff was saturated with water?
A. It looked to be something that was poured on it, perhaps it was water.
Q. But the kindling wood. I ask you how it looked. Do you say it looked as if it was saturated with water?
A. Yes, sir; the contents of the box.
Q. How did that kindling wood look like, if it was saturated with water?
A. How did it look like?
Q. Yes.
A. It looked like kindling to me.
Q. What kind of kindling?
A. I told you, I said pine wood.
Q. What was its appearance, was it burned or scorched?
A. Yes, sir; it was scorched.
Q. That is the way it looked?
A. Yes, sir.
Q. Do you know what became of the box?

A. It was put temporarily into the store-room.
Q. Who ordered it put in the store-room?
A. The superintendent, I think.
132 Q. Was not the superintendent there, did you not see him?
A. I did not see him when this box was put into the store-room, but I was told he ordered it put in.
Q. But you were not there when he ordered it put in?
A. No, sir; I was not.
Q. Were you there when it was taken off the ash pile?
A. No, sir.
Q. Did you ever see that box before that day?
A. Not to my recollection.
Q. You looked pretty well at what came out of the box?
A. Yes, sir.
Q. Can you give us a *batter* (better), or more clear description of what came out of the box, as you were there and looked at it?
A. Well, I saw burned paper and I saw kindling, and I think there was some matches in there and a piece of candle, if I recollect right.
Q. And you say the box was burned?
A. Yes, sir.
Q. Just as it is now?
A. Yes, sir.
Q. Who locked it up in the store-room?
A. I did myself.
Q. You locked it up in the store-room?
A. Yes, sir.
Q. From whom did you receive it?
A. I think the porter, a man by the name of Johnson brought it in there.
Q. How long did you keep it in your possession in the store-room?
A. I think it was about 48 or 24 hours in there, I do not recollect which.
Q. And after that, to whom did you give it to?
A. It was Mr. Minor took it out, I think.
Q. Now, can you remember all the people that were present at that ash pile when Mr. Dowling and Mr. Gee brought that box out?
A. I do not think I can. I remember Johnson, and I think I saw Mr. Stokey there.
Q. How far is that ash pile from the back fence?
A. I should say it was about 25 feet or 30, perhaps.
Q. At that time?
A. Yes, sir.
Q. How far was that little house from the back fence, the pump-house?
A. I guess about 8 or 10 feet.
Q. Is not the ash pile between that house and the fence?
A. No, sir; I think not, the ash pile is on this side.
Q. Or was at that time?
A. Yes, sir.

Q. Did you go back to the vault that day?
A. No, sir.
Q. Did you look into the vault at all that day?
A. I could not see anything, there was dense smoke when I went there.
Q. There was a dense smoke when you arrived there?
A. Yes, sir.
133 Q. And you say it choked you?
A. Yes, sir.
Q. You do not know what kind of smoke it was?

The COURT: How can you expect him to answer that question? Do you expect him to state what the chemical constituents of smoke are?

WITNESS: It was a very bad smoke so far as I know.

By the COURT:

Q. Can you tell what was the character of this smoke, where it came from?
A. It came from, I should think, burned paper and smothered wood.

By Mr. EARHART:

Q. What did you say your position was there?
A. I was down in the counting-room.
Q. Then as I understand you, you do not know what kind of a smoke it was?
A. I have stated what kind it was, as I thought. I think it was from the variety of stuff there that the smoke came.
Q. You do not know how burned paper smells, or burned rags. You only know you were in this dense smoke and suffocating, and you cannot tell what kind of a smoke it was?
A. It was kind of a mixture.

Cross-examined by Mr. SPENCER:

Q. When you say Gee and Dowling carried out the box to the ash pile and threw it down, you say that the cover was closed?
A. Yes, sir.
Q. And Mr. Dowling kicked the cover off?
A. Yes, sir.

By Mr. EARHART:

Q. You say this box was carried out by these two men?
A. Yes, sir, I met them at the foot of the stairs as they were carrying it out.
Q. Was it on fire, or not, did you see any smoke?
A. I did not notice any smoke.
Q. You did not notice what its condition was?
A. No, sir, I did not because they carried it very fast and I went out after them.

Q. When you saw it kicked over, you were at it as near as they were?
A. Yes, sir.
Q. When you saw that kicked over did you see the smoke there?
A. Yes, sir, it seemed to me there was smoke there.

134 By Mr. SPENCER:

Q. When they carried that box past you, the lid was down; that is your recollection?
A. Yes, sir.

A. 13. JULES STOKEY, sworn for the plaintiff in rebuttal, says:

By Mr. EARHART:

Q. What was your business in the United States mint during the year 1893?
A. Engineer.
Q. Do you know Mr. Dowling and Gee?
A. Yes, sir.
Q. Did you go into the cashier's office that morning when you heard there was a fire?
A. No, sir.
Q. When was the first time that you saw Gee and Dowling after the fire?
A. Out on the dump pile in the yard where we throw ashes.
Q. What did you see them do?
A. I saw them throw a box over on the ash pile.
Q. Would you know that box if you saw it?
A. Yes, sir.
Q. Look at this box in court here and see if that is the one, the wooden box?
A. Yes, sir, that is the one.
Q. What did you see when you saw them throw the box there?
A. I saw them walk off.
Q. As they walked off, what did you see Mr. Dowling do?
A. As I went there and saw them throw the box down, they walked off. I was at the blacksmith shop, walking towards the ash pile when it happened.
Q. Did you look into the box after that?
A. Yes, sir, I looked around the box afterwards, I walked right up on the box.
Q. Was the lid down?
A. Yes, sir, it was partly down.
Q. How did the lid get up?
A. I did not notice.
Q. Did you see what came out of the box?
A. Yes, sir.
Q. What was it?
A. Burned pine, paper and a piece of candle.
Q. Look into that box before the jury—does it look like that stuff?

A. Yes, sir, partly, some of it was burned and some of it was not burned.

Q. Was any smoke coming out?

A. No, sir, I did not notice any smoke.

Q. Did you get there immediately after it was turned over?

A. Immediately, I was on my way walking to the pile when the box was thrown down.

135 Q. Was that box burned as it is now?

A. Yes, sir.

Q. Where was the engineer's department, how close to the ash pile?

A. The engine was on the second floor, and I used to go down to the blacksmith shop and boiler-room, and generally all around, and generally where there was machinery, that is where I used to be.

Q. How close was it to the ash pile?

A. Where I was coming from was the blacksmith shop, coming from the blacksmith shop towards the pile, I should say it was 75 feet.

Q. Do you know what became of these things turned out of the box such as charred wood and other things?

A. No, sir, I never paid attention, I went upstairs.

Q. Who was there with you?

A. I noticed Mr. Dowling and Mr. Gee, and after that lots of men came there and I went off.

Q. Did you see anybody else, did you see the superintendent?

A. Yes, sir, I went up and told the superintendent that they had a box that was on fire, that was thrown on the ash pile.

Q. The box that was on fire, did you bring it in?

A. He came down to my best recollection and looked at it.

Q. You were there when he looked at it?

A. Yes, sir.

Q. What did he do?

A. He walked off; he did not know what to do, I do not suppose.

Q. Did he give any order about it?

A. I went off then and do not know whether he gave orders about it, or not.

Q. Do you know you went after him?

A. Yes, sir.

Q. He came down and looked at this same box?

A. Yes, sir.

Q. Then he went off and you do not know whether he gave any orders about it, or not?

A. No, sir, I do not.

Q. Did you ever go into the cashier's vault officially?

A. No, sir, I never went into the vault.

Q. Did you ever go into the cashier's vault?

A. No, sir, I may have passed through the hall.

Q. You done no work in the vault at all, or in the office?

A. No, sir.

Q. That is all you know about it?

A. Yes, sir.

Adjourned.

NEW ORLEANS, LA., *December 12th*, 1899.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury, and all of counsel present.

136 Dr. BARRETT, recalled on behalf of the plaintiff, says:

By Mr. EARHART:

Q. You were sent here as an expert as I understand it, in some official capacity, from Washington to New Orleans, to examine the cause of the fire in the United States mint?

A. I was sent here by the Mint Bureau.

Q. State when you were sent, what capacity you were sent in, and who sent you.

A. I was sent here by the Director of the Mint to examine——

Q. When?

A. In July, 1893. I arrived here in the morning, I think it was on the 5th of July, or the night before, and I began my examination of the mint on that day, the 5th of July, as to everything in relation to this fire.

Q. When you arrived here, whom did you call upon?

A. I think it was either—I think it was the night before, or it was early in the morning of the 5th.

Q. I mean officially, whom did you call upon then?

A. I called officially on the morning of the 5th of July, at the United States mint at New Orleans and presented my credentials to Dr. Smythe, the then superintendent.

Q. How soon after that did you enter upon your official duties, for which you were sent?

A. I entered upon them immediately.

Q. Then what did you do?

A. I went to the cashier's vault and asked to see the vault.

Q. Were you then taken there, did you go with anybody?

A. I think Dr. Smythe went with me, and Mr. Dowling went with me, if I remember right.

Q. When you were taken to the cashier's office, what did you do?

A. The first thing I asked was to see this vault where the fire took place.

Q. And you went there with these two gentlemen?

A. I think Mr. Dowling and Dr. Smythe were with me, if I remember right. It is six years ago now.

Q. When you got there what did you do, or what was shown you?

A. I took at that time a general view of the vault.

Q. First, tell me what you did when you went there with Dr. Smythe.

A. I had a general view of the vault in the first place. I saw the matting on the floor; the floor was covered with cocoa matting, that was covered with soot, and I saw many pieces of a lamp shade,

broken and scattered over the floor, and there was a row of
137 shelves on the left-hand side of the vault; and there was an iron safe, which you reached before you reached the end of the vault. There were two shelves, one above the other, on the left-hand side running back across the rear of the vault, a set of shelves or compartments on each side, which were divided by a partition. They were broken pieces of a lamp shade on the top of the shelf. Everything was covered with soot, the tops of the shelves, the matting on the floor, and everything that was lying there seemed to be covered with soot.

Q. Where did you find the lamp chimney of the coal-oil lamp?

A. The lamp chimney and the coal-oil lamp were on the floor.

Q. Where did you find the coal-oil lamp?

A. I think I saw that on the floor. I was informed that it lay just where it laid from the first.

Q. Who informed you of that?

A. Mr. Dowling.

Q. That it laid right there after the fire, until you got there?

A. Yes sir, in the vault. I asked Dr. Smythe if everything in that vault was in the condition in which it was at the time of the fire, and I was informed by him, that the things were left and had been left on purpose there, in that shape, until the investigation should be made.

Q. Until you reached there?

A. Yes, sir.

Q. When you picked up this coal-oil lamp, was there any oil in it?

A. There was a small quanity.

Q. Please describe to the jury, as near as you can, the condition of the coal-oil lamp when you picked it up.

A. I examined that lamp very carefully, to see first what caused the lamp to fall that far. There was do dent in the lamp to show that any blow had been given to it, or anything to show, that a severe blow had indented it in any way, but at the bottom of the lamp, by comparing it with the bracket—it was screwed in a metal bracket, I found it was twisted off, and evidently with the intention to unscrew the bottom of the lamp. The screw was remaining in the bracket, it could not be unscrewed, and it had to be torn out of the bottom of the lamp.

Q. Was there a wick in the lamp?

A. Yes, sir, as usual.

Q. When you say that it was not dented, you mean it was a metal lamp?

A. Yes, sir, it looked like one of these nickel lamps.

Q. Did you see the bracket where it was held?

A. The bracket was not by the lamp; the bottom of the lamp was twisted off the bracket; the chimney was intact.

Q. I assume you mean by the bracket, the piece of metal
138 that fits on another piece of metal that is attached to the wall of the vault.

A. Yes, sir.

A. Yes, sir, this was an arched piece of metal, swinging from the socket on which the lamp was supposed to stand; the thimble of the bottom of the lamp was twisted off the bottom and remained in the bracket—that is, the little thimble remained in the bracket, which thimble was twisted out of the bottom of the lamp.

By the COURT:

Q. What did you say about the chimney?
A. The chimney was unbroken.
Q. Where was that?
A It lay on the floor.

By Mr. EARHART:

Q. You say there was a wick in that lamp?
A. Yes, sir.
Q. Did you experiment with the lamp?
A. I experimented with the wick; I lighted it; it burned for a few minutes and I put it out, and the wick too and found there was oil in the lamp.
Q. Was Dr. Smythe present when you done this?
A. I do not think he was present when I lit it.
Q. But he was there, when he turned all the property over to you in the condition it was after the fire?
A. He did not remain with me.
Q. But he was there when he turned this property over to you?
A. Yes, sir, when I was formally put into possession of these things.
Q. Mr. Dowling was in the vault at that time?
A. He was about there, back and forth.
Q. I mean, at the time Dr. Smythe came in and you and the superintendent entered that vault together, the cashier was with the superintendent of the mint, and as I understand your testimony, showed you all this debris on the floor, just as it was after the fire, which remained that way until the expert came from Washington, and that you were that expert? Is that true?
A. Yes, sir.
Q. Did you find anything else in that vault, besides the articles you mentioned?
A. On the top shelf there were several unburned matches, and there were several toothpicks lying along the top shelf; and there was a basket I think on the second shelf which was partially scorched, and contained scraps of paper; there was a small wooden box very badly burned, and a very small coin box very badly burned, and there was a bulletin-board that was scorched on one side also.
139 Q. Did you examine the shelf that was immediately over this wooden box?
A. I did. The under portion of the shelf was burned in some places, and *and* was scorched under that place which covered this big wooden box.
Q. Do you know the width of the shelf?
A. That shelf was 15 inches wide.

Q. Is it there now?
A. No, sir.
Q. Is the place or the socket where that shelf rested there now, to show the width?
A. There is a place there which shows where the original shelf lay.
Q. That was over this wooden box?
A. Yes, sir.
Q. Will you, to the satisfaction of the jury, take a rule—have you one?
A. I have not one.
Q. I want you to measure the width of that burned wooden box—you say that the shelf was 15 inches wide—I want to get the width from you?
A. I have no rule with me; if anybody has a rule I can measure it.
Q. Did they show you where this wooden box stood?
A. Yes, sir, I asked Mr. Dowling particularly where that wooden box stood at the time of the fire and what the position of the tin box was in relation to the wooden box.
Q. Now, let us keep to the wooden box.
A. He showed me the place where it stood, underneath on the floor, underneath the lower shelf, with the lid up, near the rear of the vault.
Q. On which side was that?
A. On the left-hand side as you go into the vault.
Q. On the left-hand side as you go into the vault?
A. Yes, sir; the shelves were on the left-hand side as you go into the vault, and this was standing under the bottom shelf on the floor.
Q. What part of the vault?
A. I say the left-hand side of the vault, near the rear.
Q. This wooden box was sitting there?
A. Yes, sir.
Q. Did he show you how far it went in, or out, under that shelf?
A. He did not, he simply said the lid was up, resting against the framework of the vault.
Q. What do you mean by "framework"?
A. The vault is built with certain iron, or steel girders, about two and a half inches in thickness, and this wooden box rested, or the lid of it rested against one of these girders.
Q. They are the steel girders that run inside?
A. Yes, sir.
Q. And there happened to be a girder under this shelf?
A. Yes, sir, extending up along the side of the vault and then extending over under the roof.
140 Q. Then this is the shelf here, represented by this piece of paper?
A. Yes, sir.
Q. On the left-hand side of the vault?
A. Yes, sir.
Q. And this is one of the girders—the steel girders?
A. Yes, sir.

Q. They run up and around the vault?
A. Yes, sir.
Q. And this wooden box was under here on the floor with the lid resting against the steel girder?
A. Yes, sir, the lid standing open.
Q. What is the width of the steel girders?
A. Two, or two and a half inches — width, I think.

The lid of the large wooden box is here measured and is found to be 14 inches, and the body, or span of the box is found to be 13 inches wide.

The WITNESS: There was a mark on the cover of that box which showed where it rested against the girder at the time of the fire; it was across the top of the box where it showed it rested against that steel girder at the time of the fire; I saw it when I took the box off in 1893.

Q. The box was not there at the time you made this examination— this box was not in the vault then?
A. No, sir, it was not.
Q. Was it shown you afterwards?
A. Yes, sir, in Dr. Smyth's room; it was shown me in the superintendent's room by Dr. Smyth and the chief clerk.
Q. And that is the same box?
A. Yes, sir.
Q. Did you see what was in it?
A. Yes, sir.
Q. Tell the jury what you saw in it.
A. The contents looked the same as I see in it now, since I have been in the court-room.
Q. Did they say anything about the box and contents, Dr. Smyth or Mr. Dowling at the time that it was turned over to you?
A. At the time they turned it over to me, they repeated to me the story as to how they came into possession of it; the story as to how it was found, the taking of it into the back yard and afterwards bringing it back and their putting it into the office of the chief clerk until I came.
Q. What did they say about the contents?
A. Dr. Smyth told me that the contents were as given to him when it was brought up from the fire, just as it was when he got it.
Q. Did you examine that safe that was in the vault?
A. I did.
141 Q. Do you know what the dimensions of that iron safe, or steel safe were?
A. Yes, sir, I did examine it, the small safe inside the vault; it was set upon blocks to raise it up to make it more convenient to handle and to get in and out; I suppose it stood four or five inches from the floor on the blocks, to make it more convenient to open and shut; I examined that safe, opened it and looked into it.
Q. What was the size of that safe, inside?
A. That safe was about 32 inches measurement, inside; in height,

24 inches and in width about 20 inches, or *vice versa*, 24 inches deep, 20 inches wide, these are the measurement- as I can remember them.

—. Did you ever measure this box?

A. Yes, sir.

Q. This tin box here?

A. Yes, sir, I measured that tin box.

Q. From the measurement of the inside of that steel safe, that was in that vault, could this box go into that safe?

A. Yes, sir, easily.

Q. Would you object to measure that tin box; do you know the measurement of that tin box?

A. I measured that tin box at the time I was there.

Q. What was it?

A. That was 18 inches long and if I remember right 10 inches wide and 6 or 7 inches deep.

Q. Was that box turned over to you?

A. Yes, sir, that box was turned over to me by Dr. Smyth.

Q. Was there anything in it when it was turned over to you?

A. Yes, sir, there was charred money in that box when it was turned over to me.

Q. Was it turned over to you just in that condition or was it in a package?

A. It was in a box, not that big wooden box but a box that had been made for it; the cover was not nailed but tied with stout cords, and the knots sealed with sealing wax, and the cord, where it came in contact with the woods, was sealed.

Q. Did you open the box in their presence?

A. Yes, sir, I did.

Q. What did you do with the box and the contents, after you took it?

A. I took the box and set it on the table, as it stood there with its contents.

Q. What did you do, then?

A. My first inquiry was—Dr. Smyth, was there, Mr. Tracey, Mr. Minor, Mrs. Rosenberg, Dr. Sandidge and one or two others whose names I have forgotten, and I took the box and set it on the table and said, "Gentlemen, is this exactly in the same condition in which it was placed in this box, originally?" And Dr. Smyth said, "No,
it is not," and I said, "Wherein does it differ?" and he said,
142 "That 500 bill is not where it was when that box was first put into the wooden box." The front of the tin box, at that time, as I will explain, was tipping inward, on the debris in the box, resting out, upon which that $500 bill, was lying across the front of the tin box. That is what he explained, that that $500 bill was not then outside of that box, at the time the tin box was first placed in the wooden box.

Q. Did he tell you where this tin box had been after the fire?

A. He did, previous to that. He told me that when the tin box was first p-aced in the wooden box, it was tied up with cords and placed in the cashier's vault; and that it remained there a day or two; he then had it taken out of that and sealed and it remained in

the chief clerk's vault until I came there, when it was taken out and turned over to me.

Q. After it was turned over to you, what did you do with it?

A. I then had the table prepared, and took it into that room for Mrs. Rosenberg to examine.

Q. Who is Mrs. Rosenberg?

A. She is a lady that came from Washington with me, an expert from the Treasurer's office, the Bureau of Redemption, where they examine burned money, and that had been her business for a long time. She was sent on expressly as an expert in burned and charred money to make an examination of the contents of that box. I left the box there on this table for her to examine, and she examined it during the time she was here; she examined the contents of that box.

Q. Did Dr. Smyth know that you turned it over to her?

A. Dr. Smyth was present at the time Mrs. Rosenberg was there. Dr. Smyth received a communication from Washington, directing that Mrs. Rosenberg should make this examination, and he knew that I gave this box containing the charred and burned money to Mrs. Rosenberg to examine, and he came in there every night when we were sealing the package up at the close of our work. Some portions were placed in the wooden box and sealed in the presence of Dr. Smyth, and sometimes Mr. Minor and sometimes Mr. Tracey knew that the box was received in the cashier's vault and the vault locked. And every morning Dr. Smyth got that box out for us, and was present when it was placed on the table, and the examination going on.

Q. Then, as a matter of fact, Dr. Smyth was present when this box was handed over to the expert, Mrs. Rosenberg?

A. Yes, sir.

Q. Give me her initials.

A. Mrs. L. E. Rosenberg.

Q. And after you had completed the investigation, and Mrs. Rosenberg had completed her investigation of this box con-
143 taining the charred and burned money, what did you do with the property that Dr. Smyth turned over to you for your investigation and hers?

A. After we had completed this investigation entire.y, the moneys being properly assorted and the charred bills had been all properly assorted and scheduled, were put in packages, and sealed in the presence of Dr. Smyth, placed in a wooden box, and sealed up in his presence. The other articles of exhibits, the broken glass, and the chimney were also sealed up.

Q. You say, in a wooden box?

A. The burned money was put in a box by itself, not in this wooden box here.

Q. What wooden box, the box you refer to is not before the jury?

A. No, sir; I stated distinctly that this tin box, containing the burned money was placed in another box, and the exhibits placed in a box by themselves.

Q. Was that box shut up, or sealed?

A. I said it was sealed up, that wooden box; that is what I said; the other exhibits, in connection therewith, were taken to vault No. 6 and locked up in vault No. 6, to be used afterwards.

Q. How was it handled, just carried in a basket, or what?

A. I carried some of them, and some of the other men carried others; no one man could handle the whole of them in a lump.

Q. Then this big burned wooden box, how did you do with that?

A. As I said, that burned wooden box was carried down there, with its contents, just as it is.

Q. Who was that delivered to?

A. That was put into that vault by me; the charred coin box, the lamp, the chimney, the pieces of broken shade, and everything I gathered up from the floor of the vault myself; one of the unburned matches from the top shelf, and everything else that I could find that was in there having anything to do with the fire, I gathered and put into that vault and locked up.

Q. Then you left the city?

A. I left the city and returned here the following December.

Q. Did you return officially?

A. Yes, sir.

Q. After you concluded your official duties in connection with this property and case, what did you then do with the property that you have described to the court and jury?

A. I turned it all over to the superintendent of the mint, and took his receipt for it.

Q. That included the burned money and everything?

A. Everything.

Q. Will you please produce before the jury the things that you found on the floor of that vault, when you first came here in
144 your official capacity, and which were shown to you by the superintendent of the mint; have you got them here in court?

A. I think some of them are here; I think they are; they are in the back room, in the clerk's office, room.

Q. I would not ask you alone to get them.

A. With somebody with me; there are several packages.

(The things spoken of are now brought into court.)

Q. Take this property as you received it and found it on the floor of the vault, as you describe it to the jury, and show it to them?

A. Yes, sir; if you will hand me some of the packages, I will open and show them what is in each. This package contains the lamp and in the charred basket, the chimney. This is the lamp; this is the bracket; this is the thimble of the lamp, that remains as screwed onto the bracket; it comes from the bottom of the lamp; this is the chimney covered with soot, as it was on that day. This bracket I think was sitting on the second shelf, smoked in that way.

Q. Where is the bracket?

A. It is before the jury. These are some pieces of the lamp shade that came off the shelves; you see they are covered with soot on one

side, and comparatively clean on the other; these are also some pieces of lamp shade coming off the shelves.

By Mr. SPENCER:

Q. What lamp shade?

A. That big lamp; these are some pieces of lamp shade on the floor, together with a match and two toothpicks.

By Mr. EARHART:

Q. Then about these pasteboard boxes?

A. This big pasteboard box, that these are in, was kept downstairs in the lower brick vault; I packed them up just there; they are mildewed now, because they were kept downstairs in the brick vault.

Q. You spoke a little while ago about some matches; where are they?

A. In that small cigar box.

Q. These are the matches found on the shelves?

A. There is one unlighted match which I picked up and put in that box.

Q. Were matches found any place else?

A. No, sir; no unlighted matches found, except on that top shelf.

Q. Were any burned matches found?

A. Yes, sir; one found inside this tin box.

Q. You mean the tin bank box?

A. Yes, sir.

145 Q. Where the money was?

A. Yes, sir.

Q. Where is that match?

A. It is here.

Mr. Earhart offers in evidence all the articles found and mentioned: the lamp, the lamp chimney, the bracket, the oil, the wicks, the broken lamp shade, the matches, the toothpicks, the unburned match, the smoked basket, and the contents of the basket.

Q. Were there some burned matches found in that vault?

A. Yes, sir; there were some burned matches on the floor.

Q. Are they in that box?

A. No, sir.

Q. Where are they?

A. I did not pick them up; it was as if one would light a candle and after using the light throw the end of the match on the floor.

Q. Then you do not say that this list is correct of the articles identified by you and introduced in evidence?

A. No, sir; I do not.

Q. Did you find any other burned matches there?

A. I stated they are in the tin box.

Q. In the tin bank box?

A. Yes, sir.

Q. Where the burned money was?

A. Yes, sir.

Q. Identify the things.

A. In the bank tin box amongst the burned money?
Q. Have you got that match?
A. Yes, sir; I have.

Witness produces the match referred to, and says he glued it fast to a card to protect it. The match is offered in evidence by Mr. Earhart.

WITNESS: I have this little box here with other things in it, I put it in this box, because it is a delicate thing and easily broken.

Q. Did you find anything else on that floor besides what you have enumerated here, or in that vault?

A. Nothing else in that vault or around the floor, except what I have enumerated here.

Q. Have you examined the electric light apparatus of that vault?

A. The electric lights I examined; they all seemed to be intact and were burning brightly when I saw them.

Q. What do you call that thing that screws onto the electric light that holds the glass?

A. That is the plug.

Q. Did you see any of these things around there?

A. No, sir; I was shown one by Dr. Smyth; but I did not see any of them lying around the vault.

146 Q. Did you find any of the broken pieces of the bulb?

A. No, sir; none at all.

Q. Were you shown any?

A. No, sir.

Q. Did you look at the three electric lights in the vault?

A. I did.

Q. Did you examine them?

A. There was nothing peculiar about them.

Q. Did you have any conversation with Dr. Smyth, about either one of them, or all?

A. I did; he gave me the bulb of one which was said to be out and the glass broken at the time of the fire.

Q. What did you say or do?

A. He gave me that bulb, and he gave me the account, as you heard it here, that the glass was broken and they found the light out. It was the rear light of the three in the vault, and he said that an experiment had been made, and it was found that by replacing the old plug by a new plug into the socket of the burner, that it lit immediately, and there seemed to be no fault with the electric current.

Q. Dr. Smythe told you that when you first went there?

A. Yes, sir; he told me that in his private room.

Q. You found out that to be a fact on your investigation?

A. Yes, sir.

Q. That these lights burned without any trouble?

A. Without any trouble at all.

Q. You say he put the b*lub* on the light and it lighted?

A. It lit when the key was turned.

Q. Did you make a search in that vault or anywhere else for any of the broken glass of that bulb?

A. I searched after the fire for anything that could have turned to fire, and I could not find any pieces of electric light globe—anything in the shape of glass or chinaware, that would be pertinent, as you would say, to the broken lamp shade.

Q. Is that what is called the lamp shade, or globe?

A. The bulb is what belonged to the electric light, and I found nothing of that kind.

Mr. SPENCER: On the question of the conversation by the witness with Dr. Smyth long after the fire, of course, the defendants recognize that such conversations and admissions would be competent evidence as against Dr. Smyth, but *competent* (incompetent) as against his sureties. We simply wish to state our position to the court, and that we shall ask the court hereafter direct the jury that it should not affect the sureties.

147 The COURT: What about the fact that the conversations have gone to the jury without objection from the defendants?

Mr. SPENCER: Because at this time, while it is being given, we cannot ask the court to exclude it, even although it would be good as against Dr. Smyth; it was on the ground that we could not state an objection.

Mr. MCCALEB: In other words, that the confession of one of the defendants is not binding on his codefendants.

The COURT (to Mr. McCaleb): You say that any statement made by Dr. Smyth, made after this burning of the money, is not binding upon the sureties; is not that a matter to be considered further on?

Mr. MCCALEB: We have stated in our defense, that if Dr. Smyth had come into court and confessed judgment, it would not prevent his codefendants from showing that there are facts which would discharge the defendants from liability.

The COURT (to Mr. Earhart): That is a question upon which counsel for the plaintiff can help the court; whether the oral statements made by Dr. Smyth, or the admissions by Dr. Smyth, after the burning of this money, are binding, as evidence, upon the sureties?

By Mr. EARHART:

Q. You have testified already about this wooden box, have you not?

A. The long wooden box; yes, sir.

Q. And the contents of that box?

A. Yes, sir; the contents of that box look just as they did to me when it was first shown to me.

Q. You have already testified that you delivered all this property after you were through with it, to the superintendent of the mint and took his receipt for it?

A. Yes, sir.

Q. Now, this small wooden box; what does that box contain?

A. This box contains the charred money, put up in single packages.

Q. You delivered that box also to the superintendent of the mint?

A. I delivered that box to the superintendent of the mint and took his separate receipt for that.
Q. For its contents?
A. Yes, sir; specifying the amount it contained.
Q. Have you got a memorandum of the contents of that box?
A. Yes, sir; I have a complete memorandum.
Q. Have you got it with you?
A. Yes, sir; I have it in my pocket.

By Mr. SPENCER:

Q. When was that memorandum made by you?
A. July 10th, 1893.
148 Q. Did you count that money yourself?
A. It was counted in my presence by Mrs. Rosenberg, and also by myself.
Q. Did you count that money yourself?
A. She and I counted it together.
Q. Were you present at all times during the count?
A. At all times during the count; yes, sir.
Q. Did you examine each and every supposed bill, do you say you ascertained it?
A. I ascertained the contents of that box, I ascertained the value of every single note that is in that box.
Q. You yourself?
A. Yes, sir; independent of her, of my own personal knowledge.
Q. And did you then and there make that memorandum?
A. I then and there made that memorandum.

By Mr. MCCALEB:

Q. Is this memorandum that you produce, the original memorandum made at the time?
A. That is the memorandum I made at that time.
Q. Or a copy?
A. The original memorandum of the burned money, made by myself July 10th, 1893.

Memorandum of the burned money offered in evidence by Mr. Earhart.

By Mr. EARHART:

Q. This is the list that you made, at the time, of the contents of the box?
A. Yes, sir; the original memorandum of the moneys in that box.

Mr. Earhart again offers the memorandum of the burned money, as made by the witness.
Mr. Spencer for the defendants objects, as the memorandum has not been yet proven.

Q. Can you testify that these notes mentioned in your memorandum were put into this box?
A. Yes, sir; I can. Allow me to say here, that Mrs. Rosenberg

made her list and I made mine; each of us had our own separate and distinct list.

Q. And this is your own list?

A. Yes, sir; made at that time.

Q. Will you please read that list to the jury, as to the contents of the box?

A. "Schedule of burned currency at the United States mint, New Orleans, July 10th, 1893." No. of package: 1, small box, one 1-dollar silver certificate of 1880; amount, $1.00.

149 Two: Small box containing one $2.00 silver certificate, 1891, $2.00. 3: 43 one-dollar silver certificate-, 1891, amount, $43.00.

No. of package, 3, small box with 20 two-dollar silver certificates of 1891.

Mr. McCaleb objects to the further reading of this document, until it is compared with the contents of this box, so that we can see as we go along whether it is cerrect or not. The point I make is this, while the defendants cannot control Mr. Earhart in the order of his proof, the best evidence of the contents of the box are the notes themselves. This paper is a mere list after all, of what is said to be in the box.

The COURT (to Mr. McCaleb): You want me to control Mr. Earhart in the order of his proofs? He is showing you what was in the box, by the list which he is reading. How can I sustain your objection to his reading the list?

Mr. MCCALEB: This box itself ought to be opened, to see whether it goes along with the list. This list is a mere index to the book, not the contents.

Mr. EARHART: This is a list of the money counted by this witness before it was placed in the box. I will prove it by Mrs. Rosenberg.

Mr. MCCALEB: Suppose Mr. Earhart never calls Mrs. Rosenberg as a witness, they made the lists themselves, both of them.

The COURT: This list certainly is in evidence, and admitted without objection, the court being asked that it be not read, that — was better to put off the reading until the opening of the box. Answer my question, Mr. McCaleb, as to how I can prevent the reading of that paper, offered in evidence without objection? Did you ever hear of that in court?

Mr. MCCALEB: Well, it is something apart. I take it that this paper is not complete evidence of a certain fact.

The COURT: That goes to the effect of it. If the plaintiff stops right there and does not introduce the box, you will be in a position to say that they did not produce the burned money at all.

Witness resumes: Package No. 3, 20 two-dollar silver certificates, 1891, amount, $40.00. Large box. Package, twelve one-dollar silver certificates, 1891, amount $12.00. Twenty one-dollar silver certificates, 1891, amount, $20.00. Three one-dollar silver certificates, 1891, amount $3.00. Thirty-two one-dollar silver certificates, 1891, numbers from 8,729,605 to 8,729,636, inclusive, amount $32.00.

Twenty one-dollar silver certificates, 1891, numbers from
150 8,729,637 to 8,729,656, inclusive, amount $20.00. Three one-dollar silver certificates, 1891, Nos. from 8,729,677 to 8,729,679, inclusive, amount $3.00. Twenty one-dollar silver certificates, 1891, Nos. 8,729,680 to 8,729,699, inclusive, amount $20.00. Nine one-dollar silver certificates, 1891, Nos. 8,729,749 to 8,729,575, amount $9.00. Fifteen one-dollar silver certificates, 1891, Nos. 8,729,758 to 8,729,772, amount $15.00. Twenty-six one-dollar silver certificates, 1891, Nos. 8,729,773 to 8,729,798, amount $26. Twenty-nine one-dollar silver certificates, 1891, Nos. 8,729,837 to 8,729,865, inclusive, amount $29.00. Five one-dollar silver certificates, 1891, Nos. gone, amount $5.00. Eleven one-dollar silver certificates, 1891, Nos. 8,729,882 to 8,729,812, inclusive, amount $11.00. Three one-dollar silver certificates, 1891, numbers gone, amount $3.00. Pasted on slips of paper in box 5. These notes were put in little pasteboard boxes so they would not interfere with each other.

Mr. EARHART: I will cease the reading of the memorandum. There is no advantage going to be taken of the defendants. I will defer the further reading of the memorandum until I put Mrs. Rosenberg on the stand.

Q. When we were interrupted by recess, the opening of the box and your reading of the memorandum was put over until Mrs. Rosenberg's examination?

A. Yes, sir.

Q. The list of the contents that you found there in the mint, did you give a complete list of it?

A. No, sir; I only read half of it, there are some other things there that I have not seen yet. If these packages were handed up to me, I will open them and see what they contain.

The packages are handed to the witness, which he opens and says: This is a coin box which I found in the vault. Upon inquiry where it was during the fire, I was told that it sat alongside of the long box.

Q. Who told you that?

A. Mr. Dowling.

Q. Mr. Dowling told you that this coin box——

A. Sat inside of the long wooden box. Here are things that I do not know anything about at all, they were not in there when I saw the box.

Q. Do you know where they came from?

A. No, sir; I never saw these things before to my knowledge. These I do not know anything about, they are fresh papers, I do not know anything about them.

151 Witness takes out of the coin box just produced, a lot of uncharred, or unburned paper, which he says he knows nothing about, the box being a small wooden box, without a lid, technically known as a coin box, about 12 inches long, 10 inches wide, and 6 inches high, approximate measurement.

The box referred to above is marked "Charred coin box," filed

by plaintiff December 12th, 1899. The papers contained in the charred coin box are marked, "Papers contained in charred coin box;" are tied in a bundle and handed to the clerk.

WITNESS: This is a bulletin-board. It is charred on the under side.

Q. Where was that found?

A. That was in the vault behind the table, if I remember right, I am not sure of that now. I think I found that behind the shelves, if I remember right.

The bulletin-board is here offered in evidence by the plaintiff.

Q. What shelves are they?

A. The long shelves along the side of the left-hand wall. This is some of the paper which was on the shelves of the vault covered with soot. I just took them up as they were to show the condition of things as I found them in the vault. Wherever a clean place is shown on the manilla paper, something had lain there *are* (or) caught the soot instead of the soot being seen on the manilla paper. I mark this the upper shelf. Where there was a letter laid that I referred to on the side, I lifted it up on the clean place, and the clean part of the envelope was on that place, the balance of it was covered with soot which was from the fire, the edges partially charred from the effects of the fire, lapping over the edge of the shelf. This is also from the upper shelf; this one extended out, and was not itself on the shelves, and of course this was the under portion of the shelf. As I see here, "rear end, upper shelf," and it is so marked on the back. This piece was a piece of blotting paper, which I marked on that, when I took the blotting paper up the memorandum pad was there, and a piece of glass shade was broken and fell on there, the shade itself had soot on it. The clean place was underneath this piece of glass and the piece of the shade. Another piece was on that place where I marked it so.

By the COURT:

Q. How far was this paper from the floor?

152 A. Say from the floor—the lower shelf was—the first shelf was 26½ inches from the floor, and the next one above it was 18 inches above that.

Q. How far from this large charred box was this paper?

A. The large charred box sat on the floor, underneath the lower shelf, and this (the paper) was on the top, the lower shelf being 26 inches above the floor and the upper shelf 16 or 18 inches above that. This sat on top; this covered the top shelf.

By Mr. SPENCER:

Q. On what side of the vault?

A. On the left-hand side as you go in the door. The long row of shelves had extended from the door. Then as you enter the door, there was a small open space before you reach there, and only say probably 3 feet in length. Then you reach the safe. Then there

was a small space between that and where the shelves begin, and the shelves extended down to this, to within about 18 inches I suppose of the rear end of the vault; then they had this 18-inch shelving crossing the whole rear end, on the right side of the safe, simply the back wall of the safe, lay a little bench, about 4 feet long sitting on the floor, up to the rear end of the right side of the vault.

By the COURT:

Q. Was there any sign of the fire having reached the roof of the vault over these papers?

A. No, sir; none at all. Here is the second shelving—the paper in the rear end of the second shelf, on that spot there is the pamphlet which I picked up, and brought along which covered that space, the pamphlet itself being covered with soot, except that clean spot. On the top of this pamphlet there has been something, but I do not know what it was, and I have not been able to find out. These are all the portions of paper from the bottom shelf, or the front part of the bottom shelf, where it is scorched on the edges. This is a tray which stood there, one portion being not exposed, and the side being exposed and burned.

By Mr. EARHART:

Q. Tell us where that stood?

A. If I remember right, this tray sat on the end of the shelving, beyond the long box.

Q. And over the long box?

A. No, sir; the side of the long box. No, sir; this stood on the second shelf in that position (flat). This being the wall out here.

Q. Which part of the second shelf?

A. On the second shelf, right over the big charred box; that caused a charring on the under edge, where it lapped over beyond the second shelf.

153 Q. What was in the tray, was there anything in it?

A. I do not remember of there being anything in the tray.

Q. When you say the second shelf, you mean there was another shelf that was over this box?

A. Yes, sir; there were two shelves. By the second shelf I mean the second from the top. The top shelf I call the first shelf.

Mr. Earhart offers in evidence the tray, the bulletin-board, and such matters connected with it by the witness.

Q. Will you please say whether you found anything more that you have not enumerated?

A. I do not remember. That box, I see lying there, after I came down from the stand awhile ago, I found this box is not the box that contained the burned money.

Q. This box here?

A. Yes, sir.

Q. Have you not a small box with some pieces of glass?

A. I have a box in my pocket, the same one which I took out this morning.

Q. Did you enumerate these?

A. I did not enumerate the whole contents of it, I only mentioned one thing, that was a burned match.

Q. Enumerate the balance before the jury.

A. There is a piece of the shade of the lamp, that was found in the bottom of that tin money box, after the money had all been examined.

Q. This tin money box here?

A. Yes, sir; it was found in the bottom, to the right-hand side of that tin money box, about half way across the box. If you notice, it has the soot on one side, and is clean on the other. I have here the metal plug, which was given to me by Dr. Smythe, as being the metal plug of the electric light, which was said was out, and the globe and bulb broken after the fire.

Q. Did that screw on all right?

A. It is of the kind that does not screw, it shoves on.

Q. Did you have difficulty in getting it in, I mean the brass piece?

A. The brass piece would slide, the film was broken, and the shade and that was the plug.

Q. What is the next piece?

A. That is all I have here now.

Q. How about that burned match?

A. That was exhibited to the jury and is in possession of the clerk.

Q. Was it found in this tin box?

A. I did find it there.

Q. You say you found a burned match in this tin box, with the burned money and you found this little piece of glass shade in this box with the burned money?

A. Yes, sir.

154 Q. Is that the contents of that box?

A. That is the contents of this box, that plug and this match. I will say here positively, because Mrs. Rosenberg and I were working together, that she first discovered one portion of that match and I immediately afterwards discovered the other, and they were both turned over immediately to me. She discovered this piece. She did not touch this piece of porcelain shade, which has just been exhibited to the jury, I took that up.

Q. The jury saw this portion of the burned match?

A. Yes, sir.

Mr. Earhart offers in evidence all of the articles above enumerated by the witness, as being contained in the small box produced by the witness, which are to be sealed by the clerk.

Q. You say this box here—what is this box; this small clean wooden box?

A. That I think—there are some samples of shades and possibly some samples of wood; I do not really remember what the contents of that box is from here. I thought at first it was the coin box that had the burned money, but on looking at it after I came down from

the stand I saw it was not. If you open the cover, I will look and see what is in it.

Q. It is a sealed box?

A. No, sir; simply put a screwdriver in there and take the cover off.

Q. Look and see if it is sealed?

A. No, sir; it is not sealed, it has a small nail put in there.

The second small clean wooden box is handed to the witness and he says: This has not anything that I got from the mint at all, nothing there that I got from the inside of the mint in any way, shape or form. I made a number of experiments in 1893, in relation to broken electric light burners and films, a long distance away from the mint, and simply put it in as experiments with broken electric light bulbs and films.

Q. Does this box then belong to this case?

A. It never belonged to the mint, it is not belonging to anything in the mint. It is my own property, making experiments in bulbs and films.

Q. Then it is your private box?

A. Yes, sir; it is. This is simply a piece of wood that I found on the ash heap in the mint; it is in that package.

Q. We are investigating this case. State to the jury, whether or not anything in that box has anything to do with this case.

155 A. I think not, I will call off these things that I know of. This was all put in simply in relation to the criminal trial, and I do not think has any relation to this case at all. I do not know what the contents of the box are, it is six years since I have seen it, but these are experiments that I made personally at electric works.

Q. How about that piece of stick?

A. That is a piece of stick that I marked from the ash heap.

Q. Look at it, it may have something to do with this case?

A. It is a piece of stick that I took off the ash heap and put in there.

Q. When did you take it off the ash heap?

A. In July, 1893.

Q. Right after the fire?

A. Possibly two or three weeks after the fire.

Q. Was it at the time you got there to investigate?

A. Yes, sir; this was several weeks after that, it was about the middle of July I took it off the ash heap. Here are some pieces of wood, that I got from the melter's and refiner's department in July, 1893.

Q. Anything else outside of the box with the burned money in it?

A. Nothing of all that I remember of now.

Q. Where is that box with the burned money; is that still in the custody of the superintendent of the mint.?

A. It is still in the custody of the superintendent of the mint.

NOTE.—It is understood that Dr. Barrett may be put upon the

stand when the examination of Mrs. Rosenberg is concluded, when witness will continue the enumeration of the money on his list.

Adjourned.

NEW ORLEANS, LA., *December 13th*, 1899.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury, and all of counsel present.

Dr. BARRETT, recalled on behalf of the plaintiff, says:

By Mr. EARHART:

Q. There is a tin box here, you have already testified that was the tin box in which the burned money was delivered to you by Dr. Smythe?

A. Yes, sir.

Q. Now, after you and Mrs. Rosenberg had taken this burned money out of the tin box, was there anything left in the box?

A. Yes, sir.

Q. Look on the inside of that box and see if anything is left and show the jury what it is?

156 A. There are portions of a one-dollar bill stuck fast to the bottom of this box. If any of you have a glass you can distinguish the number and the denomination of the bill. I can give you the number, however, as it is on my schedule. It is portions of a one-dollar bill, at the bottom of the package; 799 was the last number on the bottom of the package. It will be the last bill on the bottom.

Q. Before you commenced or began the investigation of the contents of that box, yourself and Mrs. Rosenberg, besides burned bills, what else did you find in that box?

A. There was a quantity of charred pieces and some white ashes.

Q A quantity of charred pieces and some white ashes?

A. Yes, sir; some would call it black ashes. The white ashes is partly the remains of bills, which cannot be distinguished by a glass, not even the question of their denomination.

Q. And the charred remains are the black ashes?

A. They are simply the charred remains of bills whose denominations can be distinguished without difficulty if you have a glass.

Q. Then as to black ashes, they are the remnants of bills whose denominations can be distinguished by experts with a glass?

A. Yes, sir; every one was distinguished, picked out, and put in envelopes.

Q. Can you state at this time about what the quantity of black ashes was?

A. The black ashes were preserved, because they were placed in envelopes, and can be distinguished presently in court, when the package is opened.

Q. They are in that box where the burned money is?

A. Yes, sir; they are on my list indicated, denominations and all.

Q. Do you remember how much white ashes there was?

A. There was not over a tablespoonful of white ashes, that white ashes belonged to bills that we discovered there in some cases; the bills were burned down to the center, and some of the white ashes got sifted from there down to the bottom; we distinguished this white ashes as destroyed edges of the bills that were found in that box.

Q. You say there was no more than a tablespoonful of that character of white ashes?

A. Yes, sir.

Q. Did you see the white ashes above?

A. Yes, sir; where the bills are destroyed, these two characters are presented, particularly where they are in a closed box. When they are in a closed box there is a large portion of black charred remains, the large portion of white ashes being the completely destroyed edges.

Q. Yesterday you stated that when Dr. Smythe turned over this box to you he told you that the $500 bill in the box was not in the same place in which he saw it, at the time it was delivered
157 to him?

A. Yes, sir; he said to me that that box was not in the condition in which he saw it, when he first placed the tin box in the wooden box.

Q. It was in the cashier's vault?

A. Yes, sir; when he put it into the cashier's vault before being sealed, I asked him why, and he said because that $500 bill there lies now over the front of that box, and it was not there then. This is the front of the box, that is where the lock was on the inside; that front of the box sat in that way, at an angle of 45 degrees on the money, and this $500 bill lay across this left hand, not completely exposed. He said that was not there, nor was that amount of money, in that box that way when he first saw it.

Q. Did he state the difference?

A. He did not. He simply said he judged by the pile. He said it appeared to him to be less money in that box, when he saw it the first time, and that condition did not exist when he put it into the box the first time.

Q. Did he say he saw that $500 bill the first time?

A. No, sir.

Q. The $500 bill was resting on that front piece?

A. Yes, sir; resting on that front piece, resting across the piece diagonally.

Q. Did you see that $500 bill?

A. Yes, sir; I stood as close to it as I do now.

Q. You saw it yourself?

A. Yes, sir; it was in intact condition, the $500 bill is one of the bills that we have here to be presented to the court.

Cross-examined by Mr. SPENCER:

Q. What is the nature of your employment by the Government?

A. I am employed as an expert.

Q. What kind of an expert?

A. My position with the Government for a great number of years has been as an expert. Sometimes in the examination of failed banks, and sometimes in examining intricate cases of robbery in mints. I assisted in the investigation of the robbery in the Philadelphia mint in 1893, and I was afterwards sent down here to assist in the examination of this case.

Q. How long have you been so employed by the Government?

A. I think my first employment by the Government, as examiner of failed banks, was during the spring of 1890 or 1891.

Q. You have been an expert for the Government for 9 or 10 years?

A. Nine or ten years, off and on: for instance, very often I
158 am in the case for the Government and very often in a case of my own.

Q. You assist in the trials of these cases of various nature?

A. Yes, sir; I assist in the investigation of cases.

Q. As an expert?

A. Yes, sir; by the Government.

Q. Did you ever testify before in reference to this money?

A. I think I did in 1893, or 1894.

Q. In the case of the United States against Dowling?

A. Yes, sir.

Q. You were the Government expert in that case, were you not?

A. Yes, sir.

Q. Did you produce on that trial all of the boxes, pieces of glass and various articles that you produced on this trial?

A. I think so, there may have been some things——

Q. Did you produce that schedule that you read out to the jury today, on that trial?

A. I do not know whether that was called for on that trial or not.

Q. Did you produce that burned money on that trial, or is this the first time you produced it?

A. What burned money?

Q. That box of burned money that you testify about?

A. That box was here. I do not know whether it was testified by me, or not. Mrs. Rosenberg was on the stand and testified about that.

Q. You gave testimony concerning that burned money?

A. Yes, sir; I did.

Q. How many cases have you testified to for the Government?

A. In what capacity?

Q. As an expert in how many cases?

A. You are asking me too hard a question.

Q. You have testified so often that you have forgotten it?

A. I have testified in a great many cases, from Louisiana to Montana.

Q. That is your business, is it not?

A. My business is as an expert, as I said before, but my special work for the Government has been in investigating and assisting in the preparation for trial, in bank cases, where there has been fraud

and robbery committed, the mutilation of books and things *and things* of that kind, and in these two mint cases. I assisted in the investigation of the Philadelphia case and this case.

159 A. Mrs. L. E. ROSENBERG, sworn on behalf of the United States, says:

By Mr. EARHART:

Q. Please give your full name.
A. Mrs. L. E. Rosenberg.
Q. What is your residence?
A. Washington, D. C.
Q. What is your business?
A. A clerk in the U. S. Treasurer's office.
Q. What department?
A. The U. S. Treasurer's office.
Q. What department of the United States Treasury Department—will you please state what particular department of the United States Treasury Department are you employed?
A. I am employed in the Redemption Division of the United States Treasurer's office.
Q. How long have you been there?
A. Since 1863.
Q. In what capacity?
A. During the whole time?
Q. Yes, in what capacity in the Redemption Division?
A. I have been there as counter, I was appointed as counter in the Redemption office and served as counter, and I am at present clerk and book-keeper. I was for a number of years engaged entirely in the counting of money.
Q. Have you ever been connected with the department of mutilated money?
A. Yes, sir, mutilated money comes entirely to the Redemption Division?
Q. You say mutilated money comes to the Redemption Division?
A. Yes, sir.
Q. Therefore it goes to your department?
A. Yes, sir.
Q. And to your duties?
A. Yes, sir.
Q. Were you ever sent here by the Treasury Department, to make an investigation of certain burned or mutilated money in the United States mint?
A. I was.
Q. Will you please state when?
A. I was sent here in July, 1893.
Q. Did you make such investigation?
A. I did.
Q. Whereabouts?
A. In the mint of the United States at New Orleans.

Q. Did you keep a list made by you, of the property, at that time, on the investigation made by you?

A. I kept a list of the burned money. I made an inventory of the burned money.

Q. At the conclusion of your investigation or before?

A. Well, I could only make an inventory of the money at the close of my investigation. I made the inventory after I had identified the money.

160 Q. Would you recognize the different packages which you investigated?

A. I would.

Q. As I understand you, Mrs. Rosenberg, in the discharge of your duties at Washington, in the subdivision of the department to which you belong, you stated that part of your duty was to examine mutilated money?

A. Yes, sir.

Q. What do you include in "mutilated money"?

A. I would call mutilated money, all money that came in for redemption, by banks. Among that money there would be money sent in, to be redeemed for new notes, then we have money that has been destroyed by accident.

Q. What do you mean by accident?

A. Destroyed by fire, sometimes eaten by mice and chewed by animals. In these cases we call it partially destroyed by accident.

Q. You include in mutilated money, burned money as well as money destroyed by mice and fire?

A. Yes, sir, all money that cannot be used again.

Q. Have you got your list of the burned money that you made at the time?

A. Yes, sir.

Q. I would make a suggestion, in order to have assistance, that you commence with the first item on the list. Produce that and explain to the jury its contents, and how you arrived at a conclusion as an expert as to the contents?

A. This box No. 1 contained a one-dollar certificate of the series of 1886. It might be well for me to say, that at the time I identified this money, the office was required to keep each series separate, and that was the reason I divided these. That was the only coin of that series, that I had, or found in the money, so that contains only one-dollar silver certificate of 1886.

Q. You recognize this one-dollar note?

A. Yes, sir, a dollar silver certificate of 1886.

Q. Leave the notes in the box in front of you, and anybody that wants to look at them can do so?

A. Yes, sir; this box No. 4 contains $45 in silver certificates, one one-dollar, two two-dollars and 43 one dollars.

Q. Where did you first find that one-dollar bill?

A. I do not remember now; these notes are not arranged as I found them, of course.

Q. You found them in this tin box?

A. Yes, sir; I found them in this tin box.

Q. This tin box that is in evidence here?

A. Yes, sir, and these notes have become somewhat broken by putting them in the box after I had identified them.

Q. I want to know where you found each item of money. If you found them in this tin box, state so.

A. Yes, sir, I will.

161 Q. You will *testified* (testify) as to the denomination, character and value of the money found in that box?

A. That box contained $45 in silver certificates, one dollar, two dollars and 43 ones, of the series of 1891.

Q. Have they any other peculiarity?

A. Nothing, I think.

Q. Take the 4th item.

A. This box contains $208 in one-dollar silver certificates, most of these notes have the numbers on, pinned up in straps.

Q. What is the number of that box?

A. Number 4.

Q. That box number 4 contains $208?

A. Yes, sir.

Q. Is not number 4 what you call the large box?

A. Yes, sir, I made a mistake, I called off number 3 and here is number 3 here.

Q. Now state what number 4, the large box, contains.

A. That contains $208 in silver certificates of the denomination of one dollar, series of 1891.

Q. Can you tell the numbers of this series?

A. On some of the notes the numbers are there and on some of them they are gone.

Q. There is one package there of 12 one-dollar notes, which have no numbers to them?

A. No, sir.

Q. There is one package there of 20 one-dollar notes?

Mr. McCaleb objects to Mr. Earhart reading from one list, produced on the examination of another witness.

The COURT: Certainly that other list is in evidence without objection, but let the examination go on as Mr. McCaleb suggests.

By Mr. EARHART:

Q. Read from the list that you made yourself, from the first item of this box number 4, read and tell the jury the contents of that box, until you have completed its contents, that is the sum of $208, thereby giving in particular details, what that $208 consists of. Start with item one.

By Mr. SPENCER:

Q. When did you make that list?

A. I made this list the 11th day of July.

Q. When did you make this investigation?

A. I was from the 5th day of July until the 10th.

Q. You made this list then after you had completed your examination?

A. Yes, sir.

Q. What did you make that list from?

A. I made it from the money.

162 Q. Did you make it from the memorandum that you had?

A. Not at all. I made it from the money. As I identified each note, I kept a list, just about as this inventory here would be, and then I put this in a box, and marked the amount and the denominations and the numbers.

Q. What I am talking about is that list; you took these various memoranda you had and made up a list?

A. No, sir, I looked at the money piece by piece again, and I compared, so as to be perfectly sure of the money. I compared the money. I read off and compared the money. I took the money and read off. I made one list, and then compared that with the money.

Q. Which list?

A. This list which I have is the original list.

Q. Where is that list which you had?

A. I simply made a copy, I think that is the copy over there (in Mr. Earhart's hand).

Q. The one in Mr. Earhart's hand, I wish you would look at that.

A. Yes, sir, that is a copy of the list.

Q. Made by you?

A. No, sir, Dr. Barrett copied it from this list.

By Mr. EARHART:

Q. This box No. 3 contains one package of 12 one-dollar notes which is $12; any serial number to them—why do you not give the serial number?

A. Because it did not have it on that part of the note; that part of the note was somewhat, although not entirely, destroyed.

Q. State why you do not give the serial.

A. I did not have enough of that note, I only had a fragment of that note to determine and the number was gone. 20 one-dollar notes, no number; 3 ones, no number; 32 one-dollar notes running from 8,729,605 to 8,729,636, amount, $32.

Q. These are serial consecutive numbers?

A. Yes, sir.

Q. That is the first you ascertained?

A. That is the first serial number I ascertained. 20 one-dollar notes, numbered from 8,729,637 to 8,729,656, amount $20.

Q. Is that serial consecutive?

A. Yes, sir.

Q. Will you please state to the jury what you mean by serial consecutive?

A. Well, the number would run consecutively, 6, 7, 8, 9, without a break in it.

Q. Adding one to one from one to nine?

A. Yes, sir; 3 one-dollar notes numbered 8,729,677 to 8,729,679 amount $3.

Q. Do these numbers run consecutively?

A. Yes, sir; 20 one-dollar notes numbered 8,729,680 to
163 8,729,699, running consecutively, amount $20; nine one-dollar notes from 8,729,749 to 8,729,757, running consecutively, $9; 15 one-dollar notes number- 8,729,758 to 8,729,772, running consecutively, $16; 26 one-dollar notes number- 8,729,773 to 8,729,798, $26, running consecutively; 29 one-dollar notes from 8,729,837 to 8,729,865, running consecutively, amount $29; 5 one-dollar notes numbers gone, $5; 11 one-dollar silver notes number- 8,729,882 to 8,729,892, running consecutively, $11.

Q. What are they?

A. Silver certificates in this box, that is all, $208 in that box.

Q. Now 3 notes, one dollar, numbers gone, $3.

A. Yes, sir.

Q. How many notes are there altogether?

A. $208.

Q. How many notes are there, or pieces?

A. $208.

Q. Of course there were more than 208 pieces because it was all broken up?

A. There would have been more than 208 pieces now, but when I took them out, I do not remember just how many pieces there were.

Q. Your list does not show?

A. No, sir.

Q. Now go back to number 3 that we skipped, and tell the jury what box No. 3 contains.

A. Box No. 3 contains two twenty-dollar silver certificates.

Q. Any serial number to them?

A. No, sir, no serial numbers to those.

Q. Why no serial numbers?

A. Well, it might have been that I did not look for the numbers, I do not remember just now. It might have been that the part where the number is had broken off. I do not remember, I did not always get the number, I did not always try to.

Q. You know it contains $40 in two $20 silver certificates, serial number missing?

A. Yes, sir.

Q. Now take the next one, box No. 5, what are the contents of box No. 5?

A. 3 one-dollar silver certificates number- 8,729,714 to 8,729,716, $3, numbers running consecutively.

Q. Can you give me the date of these silver certificates?

A. Yes, sir, they are 1891.

Q. Then they are serial numbers of 1891, one-dollar bills, $3, take the next one.

A. One one-dollar note 872,922.

Q. Of the same issue, silver certificates of 1891?

A. Yes, sir, all this box is of 1891. A one-dollar note numbered

8,729,733. A one-dollar note 8,729,900; a one-dollar note 8,729,700, making $7.

Q. Look at your list again, that makes $7 serial numbers?

A. No, sir, the numbers do not run consecutively there.

164 Q. Then that makes $7 of the numbers that you have given, the last being 8,729,700, of a one-dollar bill?

A. Yes, sir.

Q. Now was that the only one?

A. Not in that box.

Q. Not in that box No. 5?

A. No, sir.

Q. Is that all the contents of box No. 5?

A. Yes, sir.

Q. The contents of that box No. 5, contains $7?

A. Yes, sir.

Q. Did you look at that one-dollar bill on the bottom of this tin bank box?

A. Yes, sir, there was a one-dollar note stuck to the bottom of the box and I could not get it off.

Q. Does that tally with the $7 item?

A. Yes, sir.

The tin bank box referred to is here submitted to the witness.

WITNESS: Yes, sir, there it is, that is the one-dollar note, 8,729,799.

Q. Have you identified that with the serial numbers?

A. Yes, sir, I gave the number of that.

Q. Now take the next box, No. 6?

A. Yes, sir; here it is. No. 6 contains a small box one Treasury note and a two-dollar note, and four one-dollar notes, making $6, of the series of 1891.

Q. Is there any number?

A. No, sir, I did not take the numbers of those. Here is a package of 12 one-dollar notes, numbers gone, Treasury notes, $12. Then there are 7 one-dollar Treasury notes running consecutively from 4,203,826 to 4,203,832; 14 one-dollar notes running consecutively from 4,203,834 to 4,203,847; 8 one-dollar notes running consecutively from 4,203,850 to 4,203,857; 10 one-dollar notes numbers 4,203,883 to 4,203,892, running consecutively, $10; 3 one-dollar notes, numbers gone, $3. These are all Treasury notes of the series of 1891.

Q. How much is the total of that box that you closed?

A. $60.

Q. The box No. 6, I believe you got as far as one item of $2 and 4 one-dollars, did you go clear down to the $60?

A. Yes, sir.

Q. You concluded that box?

A. Yes, sir.

Q. Now take up box No. 7.

A. This is an envelope, this envelope is marked No. 2, that is a mistake, it should have been marked No. 7. I know by the inventory on the envelope corresponding to this.

165 Q. You identify that envelope before you open it as to what it contains?

A. Before I open it?

Q. Yes, you say there is a mistake about it?

A. I can compare it with this inventory; it is a $500 note; I have the inventory here No. 13945, legal tender, $500, and one one-hundred-dollar note.

Q. What years?

A. 1880, number 81373, of 1875 is the $100 note. One $50 note of 1880, number 204,018, one $50 note of 1880, number 54490, I would not say positively that that 54 is the whole of the number.

Q. It is the $50 bill of the series of 1880?

A. Yes, sir; 1878, number, 136,228, one $50 bill; one $50 bill 1874, number 428,393; one $20 bill, number partly gone, date 1880.

Q. That is what you say is in that envelope?

A. Yes, sir; box No. 8 contains fragments of one and two dollar notes, silver certificates, I do not know the value of these, but they are portions of the notes that I have already identified as box No. 9, is of the same character. Of some of these notes, I had only very small portions. When I separated them they broke, so that I pasted some of the notes, but some of them, just the pieces that I took off and fragments that I set aside.

Q. Box No. 9 contains also fragments of one dollar and two dollar notes?

A. Yes, sir.

By the COURT:

Q. While you could not identify the bills as I understood you, are you prepared to say that they are fragments of one-dollar bills?

A. I examined all the fragments and they are all one and two dollar silver certificates and Treasury notes; there are some fragments of Treasury notes. I simply put the fragments of the notes in these boxes.

By Mr. EARHART:

Q. That box No. 9 is also of the same character?

A. The same character.

Q. That concludes the contents of these boxes as I understand you?

A. Yes, sir.

Q. In your search through all this money that you have classified in that way, did you find any fragments of any bill, over and above one and two dollars?

A. No, sir; do you mean in the fragments?

Q. Yes, in the fragments, I do not speak of whole bills like the $500.

A. No, sir.

Q. As a matter of fact you did not find any fragments of
166 any bill, over the denomination of $2?

A. No, sir; I did not.

Q. These boxes 8 and 9 contain the fragments that you did find?

A. Yes, sir.

Q. That is all the fragments?

—. Yes, sir; some of these fragments came from notes I identified, and I simply threw them to one side, because I could not put them in these boxes. If a corner piece broke off, I would put it into this box after I had identified it.

By the COURT:

Q. Have you gone through with your list?

A. Yes, sir.

Q. Do I understand you that you have testified and that the jury has now seen either the burned bills, or the fragments of burned bills, of all—of everything that was submitted to you for examination?

A. Everything that I found in the box in the nature of money.

By Mr. EARHART:

Q. What do you call black ashes?

A. Well, that would not be ashes, they would be called ashes, but they are fragments so broken up, that of course they can — be identified now.

Q. But you classify them as fragments and not as ashes?

A. Yes, sir.

Q. Did you see any ashes there?

A. Yes, sir; I did.

Q. What was the color of those ashes?

A. Nearly white, a grayish white.

Q. How much did you find?

A. Not more than a tablespoonful.

Q. From what would this kind of ashes come?

A. It would come from the packages of notes; there was one package of notes that was burned around the edge, which burned through the center; I saw the ashes in the center and the ashes had sifted down from the package of money.

Q. It was the white grayish ashes that had sifted through?

A. Yes, sir.

Q. In what box was that ashes?

A. I cannot say now.

Q. Was it not in that large box?

A. I cannot say because as I identified them, I laid one note on the other, and I cannot say where these are now.

Q. You have a great deal of experience about the package of notes; did you notice how these notes that you examined were packed?

A. They were packed—just little packages of new money;
167 * there was one old note, that note of 1886; all the ones and twos of the silver certificates and Treasury notes seemed to be new money.

Q. New money?

A. Yes, sir.

Q. From your experience, on the different packages of money that have been sent to you, could you tell the difference between a

package of notes that had been in circulation, and a package of notes that came from the Treasury Department, that had never been in circulation?

A. Yes, sir.

Q. Did you see any distinction of that character of packages, on this examination?

A. I did not, with the exception of that one-dollar silver certificate of 1886; that was a little older than the others; it was an older issue.

Q. How did that look to you, whether that had been in circulation, or not?

A. Well, I could not say exactly that; yes, sir, that must have been in circulation, I suppose, for some time; it looked like the note that might have been paid out over the Treasury counter; it was not a crisp note, as were the others.

Q. What was the denomination of that note?

A. One dollar.

Q. Now, the other packages of money seemed, or looked to you, as if they had not been in circulation?

A. Yes, sir, the silver certificates and the Treasury notes looked new.

Q. And there was the serial number on that that you have described?

A. Yes, sir.

Q. In box No. 4, you have described the serial numbers 8,729,605 to and including 8,729,636?

A. Yes, sir.

Q. That is all in one lot?

A. Yes, sir.

Q. Did all these look to you as new notes, not having been circulated?

A. Yes, sir, these looked like new notes.

Q. In box No. 4, you have also described the serial number as 8,729,882 down to 8,729,892?

A. Yes, sir.

Q. Did these notes, considering the serial numbers look to you like new?

A. Yes, sir, they were apparently new notes.

Q. Of course, in that box No. 4, there were some that you have not got the serial numbers of?

A. Yes, sir.

Q. Then in box No. 5, there are serial numbers, on the one-dollar notes, or silver certificates of 1891, the numbers being from 8,729,714 to 8,729,700 and the serial numbers on the slips; could you tell whether or not, from your examination of these serial num-

168 bers and slips whether they were new or old notes?

A. I said it that time, I do not know now; yes, sir, these are all new notes.

Q. Now, without going to the other serial numbers, is it not a matter of fact that on your investigation as to whether or not the notes belonged to the category of new or old notes, or notes that

have never been in circulation, that you would be guided in coming to a conclusion as an expert, by the fact that the serial numbers on each note, as laid upon the top of the other, would follow?

Mr. McCaleb objects to the question as leading and suggestive and the court excludes the question.

Q. Then will you state the methods by which you could state, how you determine as an expert that any number of notes that may be placed in your possession, would belong to the category of new or old notes, or notes that had been circulated, or not circulated?

A. A new note—a note that had not been in circulation, would be very crisp, and an old note would be thinner and have some appearance of an old note. That would be the distinction that I would make.

Q. How about packages of notes, if a package of notes were handed to you?

A. I do not understand you.

Q. Suppose a package of notes were handed to you, could you tell whether they had ever been in circulation, or not?

A. Yes, sir, I would be able to tell whether they had been in circulation, or not.

Q. By what methods?

A. As I say, new notes would be crisp, and old notes would be flatter, or more pressed out.

Q. Did you ever notice how packages of new money came from the Treasury Department?

A. How they go out from the Treasury?

Q. Yes, how they appear coming out?

A. Yes, sir, they are put up in packages, having the numbers running consecutively, in packages of 100.

Q. Have you noticed the packages that have been sent to you, where the numbers have not run consecutively?

A. That have come in for redemption, when burned?

Q. Yes.

A. Yes, sir; I have had packages of that kind.

Q. What kind of notes would they be?

A. They had been packages that had been issued; and I have had during the progress of my work had packages from the express companies, where the money was sent out from the Treasury Department, injured by fire or wreck on a railroad, and they would issue new notes for them; that is where I would have the new notes in my hands, that would come back to be replaced.

169 Q. What did you find in these cases, did you find that they were mixed, or that they run consecutively?

A. I found parts of packages that might run consecutively, just as I have this list; that is, in ones and twos.

Q. Did you find any evidence of whether the packages had ever been broken?

A. Yes, sir; when the boxes came to me, they looked as if they had been broken.

Q. Did the numbers still run consecutively in these packages that had been broken?

A. These packages, as I took them out?

Q. Do you understand me? I ask you did the numbers run consecutively in these packages that had been broken?

A. Yes, sir; as I remember, they did.

Q. In what category did you place these notes, new or old?

A. These were new notes.

Q. Could you tell this jury whether they had been circulated, or not?

A. Well, a note might be in circulation—no sir, these notes had not been in circulation; they did not have that appearance to me, at all; they had the appearance of new notes.

Q. Now, how many silver certificates—the value of silver certificates, did you find in this box?

A. $202.

Q. How many of the legal tenders?

A. $820.

Q. How much in Treasury notes?

A. $60.

Q. What was the total of what you found in this box?

A. There were $1,181; of course, that includes not the one dollar that I found stuck to the bottom of the box, that made the amount of $1,182.

Q. Then with that one-dollar bill the amount was $1,182?

A. Yes, sir.

Q. Then, as I understand from your testimony, this $1,182 included your finding of the notes of the denomination of "one" and "two" dollars?

A. One and two dollars and the legal tenders were of larger denomination.

Q. Which means, the $20, the $50's and the $100 and $500?

A. Yes, sir.

Q. That included the $500 note?

A. Yes, sir; in that $1,182.

Q. Then that would leave, after the $500 bill was taken out, $582 of one and two dollar notes?

A. There would be some 50's and 20's in that number.

Q. Yes, the four 50's and the $20's. That four 50's would be $200?

A. Yes, sir.

Q. You have your list before you?

A. Yes, sir.

170 Q. There is one $500 note; one $100 note, then there are four 50's in that second box, and one $20, which make $820?

A. Yes, sir.

Q. Then there would have been, after taking out these larger notes, $362 of one and two dollar certificates?

A. Yes, sir.

Q. And the ashes, about a tablespoonful of grayish white ashes?

A. Yes, sir.

Q. And these black fragments?

A. Yes, sir.
Q. Have you exhibited to the jury everything that was in that x, including the black and white ashes?
A. Everything in the nature of currency.
Q. How about the black fragments?
A. They have been exhibited.
Q. My figures are about right, as to these one-dollar and two-dol- certificates, making $360 of one and two dollar certificates, and 20 of the larger notes, which include the $500 and the four $50 d the $20?
A. Yes, sir; $820 in the larger notes and the $360 in the smaller tes, or silver certificates.
Q. After you concluded your examination of the contents of the box, you then ascertained about these white ashes and burned gments?
A. I found these fragments in going through the box, some of em, and some I found as I would take no note of. I had to sepa- te the notes with a thin-bladed knife, and sometimes, in order to re the note, I would have to break it. I would have to identify e note before I would do anything with it, and then I would save ese fragments. Some of the notes were broken and the edges had len between these fragments, and these are what I found, as the bris.
Q. Then, as a matter of fact, these fragments belong to the notes at you have already described?
A. That I have described.
Q. How much of these fragments do you think do not belong to ese notes?
A. That do not belong to them?
Q. Yes.
A. I think they all belonged to them.
Q. Almost all?
A. All of them; yes, sir.
Q. Now, these are the fragments from these bills, that you have eady described and classified?
A. Yes, sir.
Q. You have got no other fragments?
A. No, sir.
Q. That is all you found in that tin box?
A. Yes, sir.
Q. Was Dr. Barrett with you when these lists were made from e money as you went over it?
A. Yes, sir; we both made lists from the money.
Q. He made a separate list and you made yours?
A. Yes, sir, I made mine and they are exact copies.
Q. And this list that he made at the time that you made your , was made from the identical money?
A. He made a list from the money and I also made my list, and compared the list afterwards.

Mr. Earhart, for the United States, offers in evidence the list now marked "R."

No cross-examination.

A 8 *bis*. H. C. MINOR, recalled for the plaintiff, says in rebuttal:

By Mr. EARHART:

Q. You have already been sworn in this case?

A. Yes, sir.

Q. Do you remember the date the fire took place in the mint?

A. Between June 24th and June 26th, 1893.

Q. Did you have occasion, on either one of these dates to go to the cashier's office and the cashier's vault?

A. I was in his office every day.

Q. I am talking about these dates.

A. I was, on these days and every day that the mint was in operation, I was in his office.

Q. Did you see anything on the floor of the vault on Monday morning, June 26th, 1893?

A. I saw that tin box that has been in evidence here.

Q. Did you see what was in it?

A. I saw there was some charred money in it.

Q. Did you see what disposition was made of that box?

A. That box was put into a wooden box and tied up, and afterwards put into the cashier's vault, then taken out of there and taken over to the chief clerk's office, Mr. Tracey, and put in his vault.

Mr. McCaleb objects to opening up the case anew.

Q. You have already stated in your testimony that Dr. Smyth was there, and that the tin box was put into a wooden box, and tied up in your presence?

A. Yes, sir.

Q. It was then put in the vault?

A. Yes, sir.

Q. In the custody of Mr. Dowling, the cashier?

A. Yes, sir.

172 Q. I want to know from you, was that box sealed at that time?

A. Yes, sir.

Q. Or was it only tied up?

A. Tied up and sealed also at that time.

Q. When was it taken out of the custody of Mr. Dowling?

A. At the end of the count; it was taken out for the count and taken to the superintendent's vault, and then turned over to Mr. Barrett, and then returned after Mrs. Rosenberg got through with the count; then it was turned over to the superintendent, and he turned it over for the inspection of Mr. Stear.

Q. Do you remember how long after that, the superintendent came and got it from Mr. Dowling?

A. I do not remember, several days.

Q. Do you remember whether the box was sealed then, or not?

A. I think it was.
Q. Was it sealed then or was it sealed previously?
A. I told you it was sealed.
Q. Well, I am trying to find out.
A. I do not know.
Q. I am trying to find out from you, whether it was sealed the first time it went into the custody of Mr. Dowling, or sealed after it came out of the custody and taken by the superintendent?
A. I do not recollect.
Q. Do you remember?
A. No, sir.

Mr. Earhart here suggests to the court that the jury ought to see the vault down in the mint as there is no plan or photograph of the vault in evidence.

Mr. McCaleb objects because it takes too long, besides the jury have had an accurate description of that vault, pro and con on both sides and the dimensions.

The COURT: In the sense of the court, it is not necessary for the jury to see the vault.

A 5 *bis*. Dr. BARRETT, recalled for the United States, says:

By Mr. EARHART:

Q. Are things the same in this vault as they were at the time of the fire?

Mr. Spencer objects to the testimony as irrelevant.

Q. You saw a safe in that vault?
A. Yes, sir.
Q. How long would it take to open and close that safe?
A. Under what conditions?
Q. To put money in, or take money out.
A. Whether the combination is thrown or simply the bolt is thrown?
173 Q. Take it when the bolt is thrown?
A. If simply the bolts are thrown, it takes a man the length of time that it takes for him to open any door.
Q. How long would it take to open the combination?
A. I never tried the combination, but I have tried the combinations of a great many safes, and it never has taken me over two or three minutes.

By Mr. SPENCER:

Q. How many figures in this combination?
A. I do not know.
Q. Then how do you know how long it would take?
A. Because I have worked them in all manner of figures, with any number of figures. I do not know the figures here in this combination, but if you give me the combination, I will open it in a few minutes.
Q. You do not know what the combination of that safe is?

A. No, sir; but if you give me the combination, I will undertake to open it in three minutes.

A 15. CHARLES H. MORE, sworn for the plaintiff in rebuttal, says:

By Mr. EARHART:

Q. You are the cashier of the United States mint at New Orleans?
A. I am at the present time.
Q. It has been testified in this case, that there was a steel safe in that vault; how long would it take to open that safe?
A. Why, turning the bolt locks it, so far as pulling the door of the safe is concerned, and turning it that way, enables you to open the door, to slip a tray in. After I turn the bolt there is no chance for the door to fly open, it is perfectly secure from everything.
Q. How long would it take you to open it?
A. No longer than turning the knob of this door of the court-room.
Q. How long would it take when you use the combination, to open the safe?
A. We never have used the combination since I have been there. I put the money inside of the safe and close the door.

Mr. McCaleb objects to this character of testimony, as to what is done in the mint since this matter occurred, and the court sustains the objection.

174 Q. I suppose you handled safes before and know about that safe?
A. Yes, sir.
Q. I ask you how long it would take you to put on the combination and to open it?
A. Well, that would depend upon the number of figures in the combination. Three figures in a combination that you are familiar with, would take about a minute. If you were not familiar with it, it would take longer.
Q. What is the usual time; is there any particular time?

Mr. MCCALEB: The witness says he never knew the combination, and how can he tell how long it would take?

WITNESS: I use the combination on the outside vault door.

Q. Would you know how long it would take to put on an ordinary combination, or to open that safe with a combination; how many minutes?

The COURT: The witness has already told you that if it was three figures and if he was familiar with them, it would take a minute, and if he was not familiar with the figures, it would take longer.

Mr. SPENCER: All this testimony is immaterial, and is simply consuming time, it is not in rebuttal.

By Mr. EARHART:

Q. What I want to know is, when you say with three figures it would take you a minute to open it, how long would it take if you had more figures or numbers?

A. If we had four figures, it would take proportionately longer.

Q. Would it take five or ten minutes?

A. No, sir; it would take probably a minute and a quarter, or more.

Q. You have seen the combination of that safe?

A. Yes, sir.

Q. Now, you know the figures on that combination. Now putting it up at the highest combination, how long would it take you to open the combination?

A. I do not know a thing about the combination, because we never had occasion to use it.

The United States here closes its case and the court adjourns.

175 NEW ORLEANS, LA., *December 14th*, 1899.

The court met this day pursuant to adjournment.

Present: His honor Charles Parlange, judge, with a jury, and all of counsel present.

Mr. Earhart now moves the court that under the issues presented in this case and the evidence, that the jury be directed to render a verdict for the plaintiff.

The court refuses all of the charges requested by the defendant.

Mr. GRANT: The court having refused the charges asked for, and without any waiver whatever, the defendants ask the court to charge the jury to give credit to the defendants for all the money identified and turned over to the United States.

The court refused to grant such instruction.

To which ruling of the court the defendants reserve exception; and also reserve exception to the refusal of the court to grant the special written charges asked for by the defendants.

Mr. McCaleb asks that the evidence adduced and offered in this case must be considered and passed upon by the jury, as if they, the facts established by said evidence, had been specially pleaded in the case.

The court refuses such instruction, and exception is reserved by the defendant.

The COURT (to the jury):

GENTLEMEN: I direct you that it is your duty in this case to find a verdict against the defendants as prayed for. The record will show that this verdict was reached by you, under the direction of the court, and if the court makes any error, in its so directing you, that error will be corrected by the appellate court.

To all of which the defendants reserve exception, which exception is granted, the court directing that all of the evidence and testimony, oral and documentary, be incorporated in the bill of exception.

The verdict is here announced.

The court here appoints the superintendent of the mint as the proper custodian of the property used on this trial.

176 Documentary evidence offered by plaintiff on the trial of the cause and referred to in the stenographic report of the testimony, referred to in and made part of bills of exception No. 1.

Exhibits "A" and "B," annexed to plaintiff's petition, being respectively the bond sued on and statements of United States Treasury balances showing deficiency.

Exhibit A, Exhibit B. Filed Aug. 7, 1894.

Transcript Certificate

TREASURY DEPARTMENT, REGISTER'S OFFICE,
WASHINGTON, D. C., *July 24th*, 1894.

Pursuant to section 886 of the Revised Statutes of the United States, I, J. F. Tillman, Register of the Treasury Department, do hereby certify that the annexed is a transcript from the books and proceedings of the Treasury Department, and true copies of the originals on file of the official bond of A. W. Smyth, as superintendent of the mint of the United States at New Orleans, La., together with 1st Auditor's report, No. 299,997, on his gold and silver bullion account of July 23, 1893, and 1st Comptroller's certificate thereon and two summaries of operations to June 30, 1893, and July 24, 1893, respectively on file with said report.

(Signed) J. F. TILLMAN, *Register.*
N. H.

Be it remembered, that J. F. Tillman, Esq., who certified the annexed transcript, is now, and was at the time of doing so, Register of the Treasury of the United States, and that full faith and credit are due to his attestations.

In testimony whereof, I, J. G. Carlisle, Secretary of the Treasury of the United States, have hereunto subscribed my name, and caused to be affixed the seal of this department, at the city of Washington, this 25th day of July, in the year of our Lord 1894.

(Signed) J. G. CARLISLE,
[SEAL.] *Secretary of the Treasury.*

EXHIBIT "A."

Bond Sued on.

Filed Aug. 7, 1894.

Know all men by these presents that we, Andrew Woods Smyth, of New Orleans, Louisiana, as principal, and Edward Conery
177 and David Chambers McCan, of New Orleans, Louisiana, as sureties, are held and firmly bound unto the United States of America in the full and just sum of one hundred thousand dollars, lawful money, to be paid to the said United States, for which pay-

ment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors and administrators, and each of them, firmly by these presents.

Signed with our hands and sealed with our seals, and dated this 18th day of March, in the year of our Lord one thousand eight hundred and ninety.

The condition of the foregoing obligation is such, that whereas the President of the United States hath, pursuant to law, appointed the said Andrew Woods Smyth, superintendent of the mint of the United States at New Orleans, Louisiana, and in due form of law caused to be issued to him, as such, a commission bearing date the twentieth day of December, anno Domini one thousand eight hundred and eighty-nine.

Now, therefore, if the said Andrew Woods Smyth shall faithfully and diligently perform, execute and discharge, all and singular, the duties of said office according to the laws of the United States, then this obligation to be void and of no effect, otherwise to be and remain in full force and virtue.

ANDREW WOODS SMYTH. [SEAL.]
EDWARD CONERY. [SEAL.]
DAVID CHAMBERS McCAN. [SEAL.]

Signed, sealed and delivered in the presence of—
HENRY J. CARTER.
HENRY J. CARTER.
HENRY J. CARTER.
EDWIN M. FULLER.
EDWIN M. FULLER.
EDWIN M. FULLER.

The following instructions must be particularly observed in the execution of this bond:

1st. The Christian names must be written in the body of the bond in full and so signed to the bond; and a seal of wax or wafer must be attached to each signature.

2nd. Each signature must be made in the presence of two persons, who must sign their names as witnesses.

3rd. Each surety must make and sign an affidavit of the amount he is worth, after paying his just debts.

4th. A district judge or attorney of the United States, or a clerk of a court of record, must certify officially that the sureties are sufficient to pay the penalty of the bond.

5th. The affidavits of the sureties must be made before an officer authorized to administer oaths generally. If the magistrate is not a judge of the United States court, or a clerk of a court of
178 record, his authority to administer oaths must be properly certified.

6th. Bond to be dated.

EXHIBIT "A."

Filed Aug. 7, 1894.

UNITED STATES OF AMERICA:

United States Circuit Court, Eastern District of Louisiana.

I, Edward R. Hunt, hereby certify that the sureties named, and who have signed the foregoing bond, are responsible and sufficient to insure the payment of the entire penalty thereof.

Witness my hand and seal of court this eighteenth day of March, A. D. 1890.

E. R. HUNT,
Clerk U. S. Circuit Court.

[SEAL OF COURT.]

OFFICE OF THE DIRECTOR
OF THE MINT, *March* 21, 1890.

I certify that the foregoing bond of Andrew W. Smyth as superintendent U. S. mint at New Orleans, La., is to my satisfaction.

E. O. LEECH,
Director of the Mint.

TREASURY DEPARTMENT, *March* 22, 1890.

Approved.

GEO. S. BATCHELLER,
Acting Secretary of the Treasury.
E. B. D.

(Indorsed:) Official bond of Andrew W. Smyth, superintendent United States mint at New Orleans, La., dated March 18, 1890. $100,000. Bureau of the Mint, March 21, 1890. Respectfully referred to the solicitor of the Treasury for examination and certificate. E. O. Leech, director. First Comptroller's office, Mar. 24, 1890. Filed. Office of the Director of the Mint. Office solicitor Treasury, March 21, 1890. Examined and found correct in form and execution. F. A. Reeve, acting solicitor. Treasury Department, March 24, 1890. Respectfully referred to the First Comptroller for file. E. B. Darkam, chief div. pub. mon's.

179 EXHIBIT A.

Affidavit of Surety.

STATE OF LOUISIANA, } ss:
Parish of Orleans, }

I, David Chambers McCan, being duly sworn, depose and say that I am one of the sureties on the official bond of Andrew Woods Smyth as superintendent of the mint of the U. S. at New Orleans; that I am a resident of New Orleans, Louisiana, by occupation a merchant, doing business at No. 35 Fulton street; that I am worth the sum of

one hundred thousand dollars over and above my debts and liabilities owing and incurred, exclusive of property exempt from execution; that I own personal property worth $—, consisting of (1) — and real estate worth $100,000, as follows: (2) Foundry in square bounded by Fulton, Julia, Notre Dame and Peters streets; sugar plantation, parish of Placquemines, 22 miles below the city of New Orleans, left bank, on Mississippi river, fronting river.

DAVID CHAMBERS McCAN.

Sworn to and subscribed before me this 18 day of March, A. D. 1890.

E. R. HUNT,
U. S. Commissioner.

(1.) Here describe the property by name, so that it can be identified, as "Fifteen shares of the stock of the Manhattan Gas-light Company of New York City."

(2.) Here describe the property by giving the number of the lot and square or the precise location, if in the city, or by metes and bounds if in the country, that it may be identified.

EXHIBIT A.

Affidavit of Surety.

STATE OF LOUISIANA, }
Parish of Orleans, } ss:

I, Edward Conery, being duly sworn, depose and say that I am one of the sureties on the official bond of Andrew Woods Smyth, as superintendent of the mint of the U. S. at New Orleans; that I am a resident of New Orleans, Louisiana, by occupation a merchant, doing business at Nos. 1 and 2 Canal street; that I am worth the sum of one hundred thousand dollars over and above my debts and liabilities owing and incurred, exclusive of property exempt from execution; that I own personal property worth $—, consisting of (1) — and real estate worth $200,000, as follows: (2) Store No. 60 Camp street; store cor. of Magazine and Natchez streets; store Nos. 1, 2, 3 and 4 Canal street.

EDWARD CONERY.

Sworn to and subscribed before me this 18th day of March, A. D. 1890.

E. R. HUNT,
U. S. Commissioner.

180 (1.) Here describe the property by name, so that it can be identified, as "Fifteen shares of the stock of the Manhattan Gas-light Company of New York City."

(2.) Here describe the property by giving the number of the lot and square or the precise location, if in the city, or by metes and bounds if in the country, that it may be identified.

EXHIBIT "B."

Filed Aug. 7, 1894.

No. 299,997.

Recorded Jan'y 10th, 1894.

(Form 95.)

TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE, *January* 10, 1894.

I hereby certify that I have examined and adjusted the gold and silver bullion account of A. W. Smyth, superintendent of the mint of the United States at New Orleans, La., commencing April 1, 1893, and ending July 23, 1893, under bond dated March 18, 1890, and find that he is chargeable, as follows:

To balance of his account ending —— —, per report No. 297,556	$14,788,218.37
To gold bullion deposited, oz. 2,674,997	49,767.40
To gold bullion parted from silver, oz. 12,957	241.05
To silver bullion purchased, oz. 1,256,624.05	944,067.50
To silver bullion parted from gold, 470.82	367.24
To transfer orders received	1,681,666.43
This sum transferred from the superintendent's ordinary expense account to reimburse this account in part for wastage of operative officers	836.91
	$17,465,164.90

I also find that he is entitled to credit, as follows:

By payment of deposit in gold coin	$49,794.73
By payment of silver purchases in Treasury notes	944,376.88
By payment of silver distribution expenses	1,278.01
By payment of transfer orders	455,000.00

181 This sum allowed the operative officers as wastage in their gold and silver operations during the fiscal year ending June 30, 1893, viz:

Melter and refiner, gold bullion, oz. 31,784	$591.33	
Melter and refiner, silver bullion, oz. 3,954.02	3,139.36	
Coiner, gold bullion, oz. 13,200	245.58	
Coiner, silver bullion, oz. 1,170.94	929.68	
		4,905.95

By warrants in favor of U. S. Treasurer, viz:

No. 2164, dated June 30, 1893	4.63
No. 24, dated July 17, 1893	266.95

By Overton Cade, his successor in office, for this sum transferred to him and with which sum he will be debited, viz:

Gold bullion, ozs. 36,487,855	$678,844.32	
Silver bullion, 8,443,605.23	704,178.57	
Gold coin	751,841.91	
Silver coin	746,152.36	
Treasury notes	403,520.59	
		15,984,537.75
Balance due the United States		25,000.00
		$17,465,164.90

as appears from the statement and vouchers transmitted herewith for the decision of the First Comptroller of the Treasury thereon.

E. ?. BALDWIN,
First Auditor.

(Office of the First Auditor, Jan. 10, 1894.)

To the First Comptroller:

I admit and certify the above balance this 15th day of January, 1894, to wit, twenty-five thousand ($25,000.00) dollars due to the United States.

H. C. STIER.
R. B. BOWLER,
Comptroller,
By C. M. FOREE,
Deputy Comptroller.

To the Register of the Treasury.

182 EXHIBIT "B."

Deposit and Purchase Account, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		
June 30.	To Treasury-notes account paid deposits and purchases during the quarter including partings from gold	$944,376.88
	To gold-coin account paid depositors during the quarter including partings from silver	49,794.73
	Parting and refining charges collected for the quarter	266.95
	Profit and loss charges collected for the quarter	4.63
		$994,443.19

CR.

1893.		Standard ounces.	Value.
June 30.	By silver bullion purchase, standard weight and value of silver bullion purchased and deposited during the quarter	1,256,624.05	$944,067.50
	Also parted from gold	470.82	367.24
	By gold bullion, standard weight and value of gold bullion deposited during the quarter	2,674.997	49,767 40
	Also parted from silver	12.957	241.05
			$994,443.19

A. W. SMYTH,
Superintendent.

183 "EXHIBIT B."

Gold Bullion, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Cost.
March 31.	To balance	33,844.885	$620, 72.78
June 30.	To deposit and purchase account standard wgt and value gold deposited during the quarter	2,674.997	49,767.40
	Also gold parted from silver	12.957	241.05
		36,532.839	$679,681.23

CR.

1893.		Standard ounces.	Value.
June 30.	By profit and loss for am't transferred from ordinary appropriation to pay in full coiner's and melter and refiner's "gold" wastages fiscal year 1893, melter and refiner's wastage	31.784	$591.33
	Coiner's wastage	13.200	*245.58
	Balance	36,487.855	678,844.32
		36,532.839	$679,681.23

A. W. SMYTH,
Superintendent.

184 EXHIBIT B.

Silver Bullion Purchase, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Cost.
March 31.	To balance	7,191,121.64	$5,763,173.78
June 30.	To deposit and purchase acc't standard weight and value of silver bullion purchased and deposited during the quarter	1,256,624.05	944,067.50
	Also silver parted from gold	470.82	367.24
		8,448,216.51	$6,707,608.52

CR.

1893.		Standard ounces.	Value.
June 30.	By silver profit fund wastage melter and refiner	3,954.02	$3,139.36
	Wastage coiner	1,170.94	929.68
	Balance	8,443,091.55	6,703,539.48
		8,448,216.51	$6,707,608.52

A. W. SMYTHE,
Superintendent.

* In red ink: (See ordinary ex. acc't report No. 297,614.)

185 *Uncurrent Coin for Recoinage, Quarter Ended June 30, 1893.*

Mint U. S., New Orleans, La.

Dr.

1893.		Standard ounces.	Value.
March 31.	To balance	4,398.65	$5,472.66
June 30.	To bullion fund:		
	T/O #23363 ex St. Louis	277,470.35	345,219.72
	T/O #23607 ex Cincinnati	270,414.65	336,441.24
	T/O #23607 ex Cincinnati, balance	4.40	5.47
		552,288.05	$687,139.09

Cr.

1893.		Standard ounces.	Value.
June 30.	By silver-coin acc't:		
	New coins, halves	180,441.87	$224,500.00
	New coins, quarters	279,705.00	348,000.00
	New coins, dimes	91,627.50	114,000.00
	Balance	513.68	639.09
		552,288.05	$687,139.09

A. W. SMYTHE,
Superintendent.

186 "Exhibit B."

Gold-coin Account, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

Dr.

1893.			
March 31.	To balance		$740,000.00
	To silver-coin acc't:		
	Exchange for gold	41,514.73	
	Exchange counter	19,000.00	
			60,514.73
	To assay coin acc't, gold:		
	Special for quarter ended Mar. 31, ret'd		50.00
	To profit and loss:		
	Transferred from ordinary appropriation to cover "gold" wastages of coiners, melters, and refiners		836.91
			$801,401.64

Cr.

1893.		
June 30.	By deposit and purchase acc't:	
	Paid for gold bullion deposited during the quarter; also gold parted from silver	$49,794.73
	Balance	751,606.91
		$801,401.64

A. W. SMYTH,
Superintendent.

187 "EXHIBIT B."

Silver coin Account, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.			
March 31.	To balance		$7,276,422.58
June 30.	To uncurrent coin for recoinage:		
	Coinage for quarter:		
	Halves	224,500.00	
	Quarters	348,000.00	
	Dimes	114,000.00	
			686,500.00
	To assay coin acc't, "silver:"		
	Special for quarter ended Mar. 31, r't'd		32.60
			$7,962,955.18

188 CR.

1893.			
June 30.	By bullion fund:		
	Transfer orders F. S. C.		280,000.00
	By silver profit fund:		
	P'd expenses distribution sub. transportation		966.76
	By gold-coin acc't:		
	Exchange for silver	41,514.73	
	Exchange counter	19,000 00	
			60,514.73
	By assay coin acc't, "silver:"		
	Assay coin reserved annual	343.50	
	Assay coin reserved sp'ls	29.90	
			373.40
	By parting and refining:		
	Charges for the quarter deposited C. S. #178		266.95
	By profit and loss:		
	Charges for the quarter deposited C. D. #179		4.63
	By balance ac. 1890	7,084,521.71	
	F. S. C.	536,307.00	
			7,620,828.71
			$7,962,955.18

A. W. SMYTH,
Superintendent.

189 "EXHIBIT B."

Treasury Notes Account, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.			
March 31.	To balance		372,897.47
June 30.	To bullion fund:		
	T/O #23518, New York	500,000.00	
	T/O #23570, New York	500,000.00	
			1,000,000.00
			$1,372,897.47

CR.

1893.			
June 30.	By deposit and purchase acc't:		
	Paid for silver bullion purchased and dep'ted during quarter, also silver parted from gold		944,376.88
	By balance		428,520.59
			$1,372,897.47

A. W. SMYTH,
Superintendent.

Gold Assay Coin Account, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		
March 31.	To balance	285.00
		285.00

CR.

1893.		
June 30.	By silver-coin acc't:	
	Special assay coins ret'd	50.00
	By balance	235.00
		285.00

A. W. SMYTH,
Superintendent.

190 "EXHIBIT B."

Silver Assay Coin Account, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.			
March 31.	To balance		294.10
June 30.	Silver-coin account:		
	Annual assay coins reserved	343.50	
	Special assay coins reserved	29.90	
			373.40
			$667.50

CR.

1893.		
June 30.	By silver-coin account:	
	Special for Jan., Feb., Mar. ret'd	32.60
	By balance	634.90
		$667.50

A. W. SMYTH,
Superintendent.

Silver Profit Fund, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		
June 30.	To silver-coin account:	
	Paid expenses, distribution, subsidiary transportation	966.76
	To silver bullion purchase:	
	To cover wastages of operative offices	4,069.04
	To balance	47,037.50
		$52,073.30

CR.

1893.		
March 31.	By balance	$52,073.30
		$52,073.30

A. W. SMYTH,
Superintendent.

191 "EXHIBIT B."

Parting and Refining %, Quarter Ended June 30, 1893.

Mint of U. S., New Orleans, La.

DR.

1893.		
June 30.	To silver coin % charges for the quarter deposited C/D # 178....	266.95

CR.

1893.		
June 30.	By deposit and purchase % charges for the quarter.....	266.95

A. W. SMYTH,
Superintendent.

Profit and Loss %, Quarter Ended June 30, 1893.

Mint of U. S., New Orleans, La.

DR.

1893.		
June 30.	To gold bullion:	
	For am't transferred from ordinary appropriation to pay in full coiners and melters and refiners:	
	gold wastages for fiscal year 1893.	836.91
	" silver-coin %:	
	Charges for the quarter deposited C/D # 179	4.63
		$841.54

CR.

1893.		
June 30.	By deposit and purchase %:	
	Charges for the quarter.....	4.63
" "	gold-coin %:	
	For am't transferred from ord'y appropriation to pay in full coiners and melters and refiners:	
	gold wastages for fiscal year 1893.	836.91
		$841.54

A. W. SMYTH,
Superintendent.

192 "EXHIBIT B."

Unpaid Deposits, Quarter Ended June 30, 1893.

Mint of U. S., New Orleans, La.

DR.

1893.		
June 30.	To balance.	73.79

CR.

1893.		
March 31.	By balance	73.79

A. W. SMYTH,
Superintendent.

Bullion Fund, Quarter Ended June 30, 1893.

Mint of U. S., New Orleans, La.

Dr.

1893.				
June	30.	To silver-coin acc't:		
		Transfer orders, April, F. S. C.....	180,000.00	
		Transfer orders, June, F. S. C	100,000.00	
				280,000.00
		To balance.....		16,137,737.71
				$16,417,737.71

Cr.

1893.				
March	31.	By balance		$14,736,071.28
June	30.	To Treasury-notes account:		
		Transfer order No. 23518, New York ..	500,000.00	
		Transfer order No. 23570, New York ..	500,000.00	
				1,000,000.00
		By uncurrent coin for recoinage:		
		Transfer order No. 23363 ex St. Louis..	345,219.72	
		Transfer order No. 23607 ex Cincinnati.	336,441.24	
		Transfer order No. 23607 ex balance...	5.47	
				681,666.43
				$16,417,737.71

193 *Quarterly Statement, Mint Accounts.*

Treasurer's office, division of accounts, July 25, 1893.

A. W. Smyth, supt. mint, New Orleans, La.

Date.			
March	31.	To balance.....	$14,736,071.28
		To transfers.....	1,681,666.43
		Contra credit.....	$16,417,737.71
		By transfers.....	280,000.00
June	30.	To balance	$16,137,737.71

A. W. SMYTH,
Superintendent.
For Mint Bureau: J. W. LOWELL,
Book-keeper.

194 "Exhibit B."

Pl'ff 2.

Balances, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

Dr.

1893.		Standard ounces.	Value.
June 30.	To gold bullion	36,487.855	678,844.32
	To silver bullion purchase.....	8,443,091.55	6,703,539.48
	To uncurrent coin for recoinage.	513.68	639.09
	To gold-coin acc't.....	.....	751,606.91
	To gold-coin acc't, assay coins.....	.....	2 5.00
	To Treasury-notes account	.....	428,520.59
	To silver-coin acc't..	.....	7,620,828.71
	To silver-coin account, assay coins.....	.....	634.90
			$16,184,849.00

Cr.

1893.		
June 30.	By bullion fund	$16,137,737.71
	By unpaid deposits	73.79
	By silver profit fund	47,037.50
		$16,184,849.00

A. W. SMYTH,
Superintendent.

Bureau of the Mint, *Dec. 2nd*, 1893.

These accounts have been examined and the balance of coin and bullion found to be correct, except the amount of Treasury notes called for, which was found to be short twenty-five thousand dollars ($25,000) upon making the annual settlement June 30, 1893 (see report of H. C. Stier), and for which sum the superintendent will be held accountable.

B. F. BUTLER.

Approved and recommended.
R. E. PRESTON, *Director.*

195 Exhibit B.

Treasury Department, *July* 28, 1893.

Hon. R. E. Preston, acting Director of the Mint.

Sir:

* * * * * * *

Upon the completion of the settlements, I examined the books of the mint and obtained from the book-keeper a statement showing the superintendent debited with the following balances of bullion and moneys on the 30th day of June, viz:

Bullion account, moneys	$16,184,849.00
Ordinary expense account, moneys	501.21
Parting and refining account, moneys	147.96
	$16,185,498.17

Exhibit "B."

The bullion and moneys were weighed and counted and the following amounts were found, viz:

	Ounces.	
Gold bullion	36,487.855	678,844.32
Silver bullion	8,443,605.23	6,704,178.57
Gold coin		751,841.91
Silver coin		7,621,463.61
U. S. Treasury notes, including balances with ass't treasurers, N. Y. and N. O.		403,520.59
Ordinary expense, moneys		501.21
Parting and refining bullion		147.96
		$16,160,498.17
Showing a deficit or shortage of		25,000.00
		$16,185,498.17

represented by some charred currency, which the cashier claimed was burned in a fire which occurred in his vault between Saturday, June 24, and Monday, June 26, 1893.

I did not attempt to ascertain the value of this burnt currency but turned over to Dr. A. R. Barrett, and Mrs. L. E. Rosenberg, a sealed box containing it, for their examination and investigation, in accordance with your instructions. * * *

Respectfully submitted.

(Signed) H. CLAY STIER, *Examiner.*

196 "EXHIBIT B."

Summary of Operations, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Cost gold bullion.
March 31.	To balance	33,844.885	629,672.78
June 30.	Deposit and purchase account:		
	Standard weight & value of gold deposited during the quarter	2,674.997	49,767.40
	Also parted from silver	12.957	241.05
		36,532.839	$679,681.23

CR.

1893.		Standard ounces.	Value.
June 30.	By profit and loss:		
	Melter and refiner's wastage	31.784	591.33
	Coiner's wastage	13.200	245.58
June 30.	By balance	36,487.855	678,844.32
		36,532.839	$679,681.23

Silver Bullion.

DR.

1893.		Standard ounces.	Cost gold bullion.
March 31.	To balance	7,191,121.64	5,763,173.78
June 30.	To deposit and purchase of standard weight and value of silver bullion purchased and deposited during the quarter	1,256,624.05	944,067.50
	Also silver parted from gold	470.82	367.24
		8,448,216.51	$6,707,608.52

197 CR.

1893.		Standard ounces.	Value.
June 30.	By silver profit fund:		
	Wastage, melter & refiner	3,954 02	3,139.36
	Wastage, coiner	1,170.94	929.68
	By balance	8,443,091.55	6,703,539.48
		8,448,216.51	$6,707,608.52

Uncurrent Coin for Recoinage.

DR.

1893.		Standard ounces.	Cost, gold bullion.
March 31.	To balance	4,398.65	5,472.66
June 30.	To bullion fund:		
	Transfer order No. 23363 ex St. Louis	277,470.35	345,219.72
	Transfer order No. 23607 ex Cincinnati	270,414.65	336,441.24
	Transfer order No. 23607 ex Cincinnati	4.40	5.47
		552,288.05	$687,139.09

CR.

1893.		Standard ounces.	Value.
June 30.	By silver-coin acc't:		
	New coins, halves	180,441.87	224,500.00
	New coins, quarters	279,705.00	348,000.00
	New coins, dimes	91,627.50	114,000.00
	By balance	513.68	639.09
		552,288.05	687,139.09

198 *Treasury Notes Account.*

DR.

1893.		Standard ounces.	Cost, gold bullion.
March 31.	To balance		372,897.47
June 30.	Bullion fund:		
	Transfer order No. 23518 New York	500,000.00	
	Transfer order No. 23570 New York	500,000.00	
			1,000,000.00
			$1,372,897.47

CR.

1893.		Standard ounces.	Value.
June 30.	By deposit and purchase account:		
	Paid for silver bullion purchased & deposited during the quarter; also silver parted from gold		944,376.88
	By balance		428,520.59
			$1,372,897.47

A. W. SMYTH,
Superintendent.

199 "EXHIBIT B."

Summary of Operations No. 2, Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

Gold Coin.

DR.

1893.			
March 31.	To balance		740,000.00
June 30.	Silver-coin acc't:		
	Exchanged for gold	41,514.73	
	Exchanged the counter	19,000.00	
			60,514.73
	To assay coin acc't "gold:"		
	Special for quarter ended March 31, r't'd		50.00
	To contingent expenses appropriation:		
	Transferred to cover wastages		836.91
			$801,401.64

Cr.

1893.			
June 30.	By deposit and purchase account:		
	Paid for gold bullion deposited during the quarter; also gold parted from silver		49,794.73
	By balance		751,606.91
			$801,401.64

200 *Silver-coin Account.*

Dr.

1893.			
March 31.	To balance		7,276,422.58
June 30.	To uncurrent coin for recoinage:		
	Coinage for the quarter, halves	224,500.00	
	Coinage for the quarter, quarters	348,000.00	
	Coinage for the quarter, dimes	114,000.00	
			686,500.00
	To assay coin acc't, silver:		
	Special assay coins, quarter ended March 31, r't'd		32.60
			$7,962,955.18

Cr.

1893.			
June 30.	By bullion fund:		
	Transfer orders F. S. C		280,000.00
	By silver profit fund:		
	Paid expenses distribution transportation		966.76
	By gold-coin acc't:		
	Exchanged for gold	41,514.73	
	Exchanged counter	19,000.00	
			60,514.73
	By assay coin acc't, silver:		
	Assay coins, reserved "annuals"	343.50	
	Assay coins, reserved specials	29.90	
			373.40
	By parting and refining:		
	Charges for the quarter deposited C. D. 178		266.95

Profit and loss.

	By charges for the quarter deposited C. D. #179		4.63
	By balance ac., 1890	7,084,521.71	
	F. S. C.	536,307.00	
			7,620,828.71
			$7,962,955.18

A. W. SMYTH,
Superintendent.

201 "EXHIBIT B."

Superintendent in Account with Operative Officers, "Silver Bullion," Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Standard ounces.
March 31.	To balance		$6,522,749.53
June 30.	To silver bullion:		
	Purchases	1,232,453.27	
	Deposits	24,095.88	
	Partings	470.82	
	U. S. mutilated coin	74.90	
	Ingots from melter and refiner	1,000,307.40	
	Clipps from coiner	496,462.50	
	Uncurrent coin for recoinage	547,889.40	
			3,301,754.17
	Melter and refiner, bullion in settlement	686,129.43	
	Melter and refiner, sweeps in settlement	374.53	
			686,503.96
	Coiner bullion in settlement	19,479.25	
	Coiner sweeps in settlement	67.74	
			19,546.99
			10,530,554.65

202 CR.

1893.		Standard ounces.	Standard ounces.
June 30.	By silver bullion:		
	Deposits to melter and refiner	40,318.34	
	Partings to melter and refiner	780.26	
	U. S. mutilated coin and refiner	319.50	
	Clipps to — and refiner	496,462.50	
	Uncurrent coin and refiner	547,889.40	
	Ingots to coiner and refiner	1,000,861.40	
	Assayer's chips to melter and refiner	318.02	
			2,086,949.42
	By balance		8,443,605.23
			10,530,554.65

Melter and Refiner's Silver.

DR.

1893.		Standard ounces.	Standard ounces.
March 31.	To balance	604,677.36	604,677.36
June 30.	To silver bullion:		
	Deposits from superintendent	40,637.84	
	Partings from superintendent	780.26	
	Clipps from superintendent	496,462.50	
	Uncurrent coin	547,889.40	
	Assayer's chips	318.02	
			1,086,088.02
			1,690,765.38

203

CR.

1893.		Standard ounces.	Standard ounces.
June 30.	By silver bullion:		
	Ingots from superintendent	1,000,307.40	
	Bullion in settlement	686,129.43	
	Sweeps in settlement	374.53	
	Wastage	3,954.02	
			1,690,765.38
			1,690,765.38

Correct.
J. CEIEL LOGARE,
Melter and Refiner.

Coiner's "Silver."

DR.

1893.		Standard ounces.	Standard ounces.
March 31.	To balance		68,093.40
June 30.	To silver bullion:		
	Ingots from superintendent		1,000,861.40
			1,068,954.80

CR.

1893.		Standard ounces.	Standard ounces.
June 30.	By silver bullion:		
	Clips to superintendent	496,462.50	
	New coins to superintendent	551,774.37	
	Bullion in settlement	19,479.25	
	Sweeps in settlement	67.74	
	Wastage	1,170.94	
			1,068,954.80
			1,068,954.80

Correct.
L. M. PITKIN,
Acting Coiner.

A. W. SMYTH,
Superintendent.

204

"EXHIBIT B."

Superintendent in Account with Officers No. 2, "Gold Bullion," Quarter Ended June 30, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Standard ounces.
March 31.	To balance		1,742.057
June 30.	Gold bullion:		
	Deposits	2,459.842	
	U. S. light coin	215.155	
	Partings	12.927	
			2,687.954
	Melter and refiner bullion in settlement	35,638.504	
	Melter and refiner sweeps in settlement	7.081	
			35,645.585
	Coiner bullion in settlement	841.188	
	Coiner sweeps in settlement	1.082	
			842.270
			40,917.866

CR.

1893.		Standard ounces.	Standard ounces.
June 30.	By gold bullion:		
	Deposits Mar., April, May, and June to M. & R.	.....	4,430.011
	By balance	.....	36,487.855
			40,917.866

205 *Melter and Refiner's "Gold."*

DR.

1893.		Standard ounces.	Standard ounces.
March 31.	To balance	.....	31,247.358
June 30.	To gold bullion:		
	Deposits Mar., April, May, and June from super't'd't	4,097.033	
	U. S. light coin	309.300	
	Partings	23.678	
			4,430.011
			35,677.369

CR.

1893.		Standard ounces.	Standard ounces.
June 30.	By gold bullion:		
	Bullion in settlement	35,638.504	
	Sweeps in settlement	7.081	
	Wastage	31.784	
			35,677.369
			35,677.369

Correct.

J. CIEL LEGARE,
Melter and Refiner.

Coiner's Gold.

DR.

1893.		Standard ounces.	Standard ounces.
March 31.	To balance	.....	855.470
			855.470

CR.

1893.		Standard ounces.	Standard ounces.
June 30.	By gold bullion:		
	Bullion in settlement	841.188	
	Sweeps in settlement	1.082	
	Wastage	13.200	
			855.470
			855.470

Correct.

L. M. PIPKIN,
Acting Coiner.
A. W. SMYTH,
Superintendent.

206 EXHIBIT "B."

Deposit and Purchase Account, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		
July 24.	To Treasury notes:	
	Paid on account for purchases	177,000.00

CR.

1893.		
July 24.	By silver bullion:	
	On account for purchases	177,000.00

T. G. TRACY,
Acting Superintendent.

Gold Bullion Account, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

		Standard ounces.	Value.
1893.			
July 1.	To balance	36,487.855	678,844.32

CR.

		Standard ounces.	Value.
1893.			
July 24.	By gold bullion transferred	36,487.855	678,844.32

T. G. TRACY,
Acting Superintendent.

207 *Silver Purchase Bullion, July 24, 1893.*

Mint U. S., New Orleans, La.

DR.

		Standard ounces.	Value.
1893.			
July 1.	To balance	8,443,091.55	6,703,539.48
24.	To deposit and purchase acc't paid on account for bullion purchased		177,000.00
			$6,880,539.48

CR.

		Standard ounces.	Value.
1893.			
July 24.	By silver bullion:		
	On account for bullion purchased		177,000.00
	Balance July 1, transferred with above	8,443,091.55	6,703,539.48
			$6,880,539.48

T. G. TRACY,
Acting Superintendent.

"EXHIBIT B."

Uncurrent Coin for Recoinage, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Value.
July 1.	To balance	513.68	639.09

CR.

1893.		Standard ounces.	Value.
July 24.	By bal. transferred	513.68	639.09

T. G. TRACY,
Acting Superintendent.

208 *Gold-coin Account, July 24, 1893.*

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Value.
July 1.	To balance	751,606.91	....

CR.

1893.		Standard ounces.	Value.
July 24.	By am't transferred	.....	$751,606.91

T. G. TRACY,
Acting Superintendent.

Silver-coin Account, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Value.
July 1.	To balance	.....	7,620,828.71
			$7,620,828.71

CR.

1893.		Standard ounces.	Value.
July 24.	By silver profit fund:		
	Paid expenses transportation F. S. C.	280.00	
	Paid expenses transportation S. S. D.	31.25	
			311.25
	By bullion fund:		
	By transfer order No. 23914, Cincinnati	50,000.00	
	By transfer order No. 23915, Chicago, F. S. C	125,000.00	
			175,000.00
	By balance		7,445,517.46
			$7,620,828.71

T. G. TRACY,
Acting Superintendent.

09 EXHIBIT "B."

Treasury Notes Account, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		
July 1. To balance		428,520.59
		428,520.59

CR.

1893.		
July 24. By deposit and purchase account:		
Paid on account for purchases		177,000.00
By balance		251,520.59
		428,520 59

T. G. TRACY,
Acting Superintendent.

Gold Assay Coin Account, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.	
uly 1. To balance	235.00

CR.

1893.	
uly 24. By amount transferred	235

T. G. TRACY,
Acting Superintendent.

Silver Assay Coin Account, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.	
uly 1. To balance	$634.90

CR.

1893.	
uly 24. By amount transferred	$634.90

T. G. TRACY,
Acting Superintendent.

10 EXHIBIT "B."

Silver Profit Fund, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		
uly 24. To silver-coin acc't:		
Paid expenses transportation F. S. C.	280.00	
Paid expenses transportation S. S. D.	31.25	
		311 25
To balance transferred		46,726.25
		$47,037.50

CR.

1893.	
uly 1 By balance	47,037.50
	$47,037.50

T. G. TRACY,
Acting Superintendent.

Unpaid Deposits, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		
July 24.	To balance transferred	$73.79

CR.

1893.		
July 1.	To balance	73.79

T. G. TRACY,
Acting Superintendent.

211 *Bullion Fund, July 24, 1893.*

Mint U. S., New Orleans, La.

DR.

1893.			
July 24.	To silver coin acc't:		
	Transfer order No. 23914, Cincinnati	50,000 00	
	Transfer order No. 23915, Chicago	125,000.00	
			175,000.00
	To balance		15,962,737.71
			$16,137,739.71

CR.

1893.		
July 1.	To balance	16,137,737.71
		$16,137,737.71

T. G. TRACY,
Acting Superintendent.

EXHIBIT B.

Quarterly Statement Mint Accounts.

Treasurer's Office, Division of Accounts, September 23, 1893.

A. W. Smyth, late sup'd't U. S. mint, New Orleans.

Bullion Fund Account.

Date.		
June 30.	To balance	$16,137,737.71
	Contra credit:	
July 22.	By transfers	175,000.00
July 31.	By balance transferred	$15,962,737.71

For Director Mint U. S.: A. D. JOHNSTON, *Book-keeper.*

212 EXHIBIT "B."

Superintendent in Account with Operative Officers, Gold Bullion, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

		Standard ounces.
1893.		
July 1.	To balance	36,487.855

CR.

		Standard ounces.
1893.		
July 24.	By gold bullion transferred	36,487.855

Melter and Refiner's Gold.

.....

Coiner's Gold.

.....

Superintendent in Account with Operative Officers, Silver Bullion.

DR.

1893.		
July 1.	To balance	8,443,605.23

CR.

1893.		Standard ounces.
July 24.	By silver bullion transferred	8,443,605.23

Melter and Refiner's Silver.

.....

Coiner's Silver.

.....

T. G. TRACY,
Acting Superintendent.

213 "EXHIBIT B."

Balances, July 24, 1893.

Mint U. S., New Orleans, La.

DR.

1893.		Standard ounces.	Value.
July 24.	To gold bullion	36,487.855	678,844.32
	To silver bullion transferred	8,443,091.55	
	Silver bullion, incomplete purchases	.....	6,880,539.48
	To gold-coin account	.....	751,606.91
	To gold-coin account assay coins	.....	235.00
	To Treasury notes	.....	251,520.59
	To silver-coin account	.....	7,445,517.46
	To silver-coin account assay coins	.....	634.90
	To uncurrent coin for recoinage	513.68	639.09
			$16,009,537.75

CR.

1893.		
July 24.	Bullion fund	15,962,737.71
	Unpaid deposits	73.79
	Silver profit fund	46,726.25
		$16,009,537.75

T. G. TRACY,
Acting Superintendent.

BUREAU OF THE MINT, *December* 4, 1893.

These accounts have been examined and the balances of coin and bullion found to be correct except the amount of Treasusy notes called for, which was found to be short twenty-five thousand dollars ($25,000.00) upon making the annual settlement June 30, 1893, (see

report of Mr. H. C. Stier,) and for which sum the superintendent will be held accountable.

B. F. BUTLER.

Approved as recommended.

R. E. PRESTON,
Director of the Mint.

214 EXHIBIT B.

Filed August 7, 1894.

Mint of the United States at New Orleans, La.

SUPERINTENDENT'S OFFICE, *July* 24, 1893.

Received of A. W. Smyth, late superintendent, the following balances on final settlement, as shown by the books of this mint to date:

Gold bullion, oz	36,487.855	678,844.32
Silver, oz	8,443,605.23	6,704,178.57
Gold coin	$751,606.91	
Gold assay coins	235.00	
		751,841.91
Silver coin	7,445,517.46	
Silver assay coins	634.90	
		7,446,152.36
Treasury notes, including credits, at New York and New Orleans	251,520.59	
Less burnt money	25,000.00	
		226,520.59
		15,807,537.75

fifteen million eight hundred and seven thousand five hundred thirty-seven and $\frac{75}{100}$ dollars.

OVERTON CADE,
Superintendent.

EXHIBIT "B."

Filed August 7, 1894.

Mint of the United States at New Orleans, La.

SUPERINTENDENT'S OFFICE, *September* 26, 1893.

Received of Dr. A. W. Smyth, late superintendent mint U. S., New Orleans, La., ($177,000.00) one hundred and seventy-seven thousand dollars, being advanced payments made on silver bullion received during the month of July, 1893, and represented in the following checks drawn by him — favor of the Fourth national

bank, New York, for credit of George D. Edmunds, Tr. B. & C. Smelting Co.:

Check No. 10512 for	72,000.00
Check No. 10513 for	70,000.00
Check No. 10514 for	35,000.00
Total	177,000.00

OVERTON CADE,
Superintendent.

215 "EXHIBIT B."

Summary of Operations, July 24, 1893.

Mint U. S., New Orleans, La.

Gold-coin Account.

DR.

1893. July 1. To balance		$751,606.91

CR.

1893. July 24. By amount transferred		751,606.91

Silver-coin Account.

DR.

1893. July 1. To balance		7,620,828.71
		$7,620,828.71

CR.

1893. July 24. By silver profit fund:		
Paid expenses transportation F. S. C.	280.00	
Paid expenses transportation S. S. D.	31.25	
		311.25
By bullion fund:		
Transfer order No. 23914 Cincinnati	50,000.00	
Transfer order No. 23915 Chicago F. S. C.	125,000.00	
		175,000.00
By balance		7,445,517.46
		$7,620,828.71

216 *Treasury Notes.*

DR.

1893. July 1. To balance	428,520.59
	$428,520.59

CR.

1893. July 24. By deposit and purchase account:	
Paid on account for purchases	177,000.00
By balance	251,520.59
	$428,520.59

Gold Bullion.

DR.

1893.			
July 1.	To balance	36,487.855	678,844.32

CR.

1893.			
July 24.	By gold bullion transferred	36,487.855	678,844.32

Silver Purchase Bullion.

DR.

1893.			
July 1.	To balance	8,443,091.55	6,703,539.48
	Deposit and purchase account:		
	Paid on account for bullion purchased		177,000.00
			6,880,539.48

CR.

1893.			
July 24.	By silver bullion:		
	On account for bullion purchased		177,000.00
	Balance July 1 transferred	8,443,091.55	6,703,539.48
			6,880,539.48

217 *Uncurrent Coin for Recoinage.*

DR.

1893.			
July 1.	To balance	513.68	639.09

CR.

1893.			
July 24.	By balance July 1 transferred	513.68	639.09

T. G. TRACY,
Acting Superintendent.

Letters Offered by Plaintiff and Filed Dec. 5, 1899, Made Part of Bills of Exceptions, Being Notifications to the Sureties on the Bond of A. W. Smythe, Addressed to Each of Them by Mail by the Treasury Officers. Marked "A 17."

UNITED STATES OF AMERICA,
TREASURY DEPARTMENT, *May* 26, 1899.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the annexed are true and correct copies of the originals as appears from the records in this department.

In testimony whereof, I have hereunto set my hand, and caused the seal of the Treasury Department to be affixed, on the day and year first above written.

[SEAL.] (Signed) L. J. GAGE,
L. J. *Secretary of the Treasury.*
S. M. G. F. A. N.

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February* 9, 1894.

Mr. David Chambers McCann, No. 35 Fulton street, New Orleans, La.

SIR: In accordance with the provision- of the act of Congress approved August 8, 1888, I hereby notify you as one of the sureties on the bond of Andrew W. Smyth, late superintendent of the U. S. mint at New Orleans, that a deficiency of twenty-five thousand ($25,000) dollars exists in the bullion account of Mr. Smyth, and that he is a debtor to the United States in that sum.

This action is based on information contained in letter, dated 5th instant, from the First Comptroller of the Treasury.

Respectfully yours,

[SEAL.] (Signed) W. E. CURTIS,
Acting Secretary.

218

TREASURY DEPARTMENT,
OFFICE OF THE SECRETARY,
WASHINGTON, D. C., *February* 9, 1894.

Mr. Edward Conery, 1 & 2 Canal street, New Orleans, La.

SIR: In accordance with the provisions of the act of Congress approved August 8, 1888, I hereby notify you as one of the sureties on the bond of Andrew W. Smyth, late superintendent of the U. S. mint at New Orleans, that a deficiency of twenty-five thousand ($25,000) dollars exists in the bullion account of Mr. Smyth, and that he is a debtor to the United States in that sum.

This action is based on information contained in letter, dated 5th instant, from the First Comptroller of the Treasury.

Respectfully yours,

[SEAL.] W. E. CURTIS,
Acting Secretary.

Commissions of A. W. Smyth, Superintendent of the U. S. Mint at New Orleans, La.

Offered by plaintiff and filed Dec. 5, 1899, certified under act of Congress. Marked Ste. A & B.

No. 1302.

UNITED STATES OF AMERICA,
DEPARTMENT OF STATE.

To all to whom these presents shall come, Greeting:

I certify that the documents hereto annexed are true copies from the records of this department.

In testimony whereof, I, John *May*, Secretary of State of the United States, have hereunto subscribed my name and caused the seal of the Department of State to be affixed.

Done at the city of Washington, this 25th day of May, A. D. 1899, and of the Independence of the United States of America the one hundred and twenty-third year.

[SEAL.] (Signed) JOHN HAY.

Benjamin Harrison, President of the United States of America, to all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the integrity and ability of Andrew W. Smyth, of Louisiana, I have
219 nominated, and by and with the advice and consent of the Senate, do appoint him to be superintendent of the mint of the United States at New Orleans, in the State of Louisiana, and do authorize and empower him to execute and fulfil the duties of that office according to law, and to have and to hold the said office, with all the powers, privileges and emoluments thereunto of right appertaining unto him, the said Andrew W. Smyth, subject to the conditions prescribed by law.

In testimony whereof, I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand at the city of Washington, the twentieth day of December, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth.

BENJ. HARRISON.

By the President:

[SEAL.] JAMES G. BLAINE,

Secretary of State.

Benjamin Harrison, President of the United States of America, to all who shall see these presents, Greeting:

Know ye, that reposing special trust and confidence in the integrity and ability of Andrew W. Smyth, of Louisiana, I do appoint him to be superintendent of the mint of the United States at New Orleans, in the State of Louisiana, and do authorize and empower him to execute and fulfil the duties of that office according to law, and to have and to hold the said office, with all the powers, privileges and emoluments thereunto of right appertaining, unto him, the said Andrew W. Smyth, until the end of the next session of the Senate of the United States, and no longer; subject to the conditions prescribed by law.

In testimony whereof, I have caused these letters to be made patent and the seal of the United States to be hereunto affixed.

Given under my hand at the city of Washington, the tenth day of October, in the year of our Lord one thousand eight hundred and eighty-nine, and of the Independence of the United States of America the one hundred and fourteenth.

BENJ. HARRISON.

By the President:

[SEAL.] JAMES G. BLAINE,

Secretary of State.

220 *Copy of Report on Annual Settlement, U. S. Mint, New Orleans, Fiscal Year* 1893.

Marked Plaintiff 1, filed Dec. 5, 1899, and made part of bills of exceptions.

TREASURY DEPARTMENT, *July* 28, 1893.

Hon. R. E. Preston, acting Director of the Mint.

SIR: Pursuant to instructions contained in your letter of the 28th ultimo, I proceeded to the U. S. mint in New Orleans, to superintend he annual settlements between the operative officers and the superintendent, and to weigh and count the bullion and moneys charged to the superintendent June 30, 1893.

I arrived there on the 1st instant, when I was joined by Mr. Leonard Magruder, appointed by you as my assistant, and at once entered upon the settlement and count, as follows:

Melter's (melter's) and refiner's settlement.

The melter and refiner delivered to the superintendent in settlement, 35,645.585 standard ounces of gold bullion, and 686,503.96 standard ounces of silver bullion, showing a gold wastage of 31.784 standard ounces, being 0.433 per cent. of the legal allowance; and a silver wastage of 3,954.02 standard ounces, being 0.416 per cent. of the legal allowance. He operated upon 73,282.216 standard ounces of gold bullion and 6,326,722.82 standard ounces of silver bullion during the fiscal year.

Comer's settlement.

The coiner delivered to the superintendent in settlement 842,270 standard ounces gold bullion, showing wastage of 13,200 standard ounces, being .3420 per cent. of the legal allowance.

He also delivered to the superintendent in settlement 19,546.99 standard ounces silver bullion, showing a wastage of 1,170.94 standard ounces and being .2070 per cent. of the legal allowance.

He operated upon 77,178.290 standard ounces of gold bullion and 5,654,361.40 standard ounces of silver bullion.

The explanations offered for these large percentages of wastage in both of these departments were trivial, and are not deemed worthy of a place in this report.

221 I am of the opinion that the interests of the mint service would be materially enhanced by a thorough examination at an early day of the methods of work in the departments of the assayer, melter and refiner, and coiner of this mint.

Upon the completion of the settlements, I examined the books of the mint and obtained from the book-keeper a statement showing

the superintendent debited with the following balances of bullion and moneys on the 30th day of June, viz:

Bullion account moneys	$16,184,849.00
Ordinary expense account moneys	501.21
Parting and refining account moneys	147.96
	$16,185,498.17

The bullion and moneys were weighed and counted and the following amounts were found, viz:

Gold bullion, oz. 36,487.855	$678,844.32
Silver bullion, oz. 8,443,605.23	6,704,178.57
Gold coin	751,841.91
Silver coin	7,621,463.61
U. S. Treasury notes, including balances with assistant treasurer, N. Y. and N. O	403,520.59
Ordinary expense moneys	501.21
Parting and refining bullion	147.96
	$16,160,498.17

showing a deficit of shortage of $25,000.00, represented by some charred currency, which the cashier claimed was burned in a fire which occurred in his vault between Saturday, June 24, and Monday, June 26, 1893. I did not attempt to ascertain the value of this burnt currency, but turned over to Dr. A. R. Barrett and Mrs. L. E. Rosenberg a sealed box containing it, for their examination and investigation in accordance with your instructions.

I stored under my seal in the cages of vault A the following silver bullion and coin, viz:

Silver bullion, 5,839 bars 999 fine, weight oz., 6,970,769.62; sundry small bars representing the melter and refiner's deductions, 999 fine, weight oz., 254.13; standard silver dollars, 7,000,000.00.

Respectfully submitted.

(Signed) H. CLAY STIER, *Examiner.*

222 (Indorsed:) No. 102,890. Director Mint. Rec. Aug. 12, –893. Treasury Dep't, Wash., D. C., July 28, '93. H. Clay Stier. Report on annual settlement U. S. mint, New Orleans, fisc. yr. 1893. No. 12329. U. S. C. court. Filed Dec. 5, 1899. H. J. Carter, d'y clerk.

Account forming part of papers marked Exhibit "B," showing a balance on Monday, 30th day of June, 1893, signed by Dr. Smythe, superintendent, in which he has the Treasury note account of $428,520.59. Marked "P 2."

Copied at page 222 of this tra-script.

"P 3." Account of Dr. Smythe, superintendent of U. S. mint, N. O., La., up to July 24th, 1893, the date of the transfer.

Offered in connection with testimony of H. C. Stier.

Copied at page 233 of this transcript.

August 4:		
Gold bullion	29,225.023	543,721.51
Silver bullion purchased under act July 14, 1890	1,731,864.68	1,400,786.26
Silver bullion purchased for subsidiary coin	2,279.04	1,139.53
Uncurrent silver coin for recoinage	322,669.44	401,454.94
Gold coin		1,500.00
Silver coin		1,622,196.03
Silver assay coin		792.50
Special silver assay coin		62.90
		3,971,653.67
Deficiency, burnt money		25,000.00
		3,996,653.67

August 4:	
Bullion fund	3,718,681.24
Unpaid deposits	339.92
Silver profit fund	277,468.71
Parting and refining	160.42
Profit and loss	3.38

(Signed) OVERTON CADE, *Superintendent.*

BUREAU OF THE MINT, *December 19, 1898.*

These accounts have been examined and approval is recommended.

(Signed) B. F. BUTLER.

Approved.

(Signed) GEO. E. ROBERTS, *Director of the Mint.* $3,996,653.67

(Indorsed:) P 4. Mint of the U. S., New Orleans, La. Balances, quarter ended September 30, 1898. (Sig.) Overton Cade, superintendent.

MINT OF THE UNITED STATES, NEW ORLEANS, LA., *August 6th, 1898.*

Received from Overton Cade, late superintendent of the United States mint at New Orleans, La., the sum of $3,971,653.66, consisting of coin and bullion as follows:

Gold bullion (29,225.023 standard ounces)	$543,721.51
Silver bullion (2,056,813.16 standard ounces)	1,803,380.73
Gold coin	1,500.00
Silver coin	1,622,196.03
Silver coin (assay in Philadelphia)	792.50
Silver coin (assay in Washington)	62.90
Total	$3,971,653.67

(Signed) C. B. BOOTHBY, *Superintendent.*

(Indorsed on back:) No. 53737. Bureau of the Mint. Rec. Dec. 12, 1898. Treasury Department, Bureau of the Mint, Aug. 6, 1898. C. W. Boothby, Director of the Mint. Subject: Receipt to the late superintendent, Hon. Overton Cade. No. of inclosures, —.

1893.		St'd ounces.	Value.	1893.		
Sept. 30.	To gold bullion	113,792.452	2,117,069.37	Sept. 30.	By bullion fund	18,871,865.80
	To silver purchase bullion	9,590,916.49	7,456,871.89		By unpaid deposits	73.79
	To uncurrent coin for recoinage	402,068.18	500,240.33			
	To gold-coin acc't		897,785.00			
	To gold acc't assay coins		465.00			
	To silver-coin acc't		7,723,791.90			
	To silver-coin acc't, assay coins		830.90			
	To Treasury notes acc't		149,885.20			
			18,846,939.59			
	To deficiency, burnt money		25,000.00			
			$18,871,939.59			$18,871,939.59

(Signed) R. M. WALSH,
Acting Superintendent.

BUREAU OF THE MINT, *January* 29, 1894.

These accounts have been examined and approval is recommended.
(Signed) B. F. BUTLER.

Approved.
(Signed) R. E. PRESTON, *Director.*

(Indorsed:) P 5. Mint U. S., New Orleans, La., quarter ended September 30, 1893. Balances. (Sig.) Overton Cade, superintendent.

Treasury Department, Auditor of the Treasury Department. Form No. 520, ed. 32,397,500.

Debit.			Credit.		
To balance on last audit, No. 14896..... oz.		$954,610.36	By payment for deposits in gold bars.....		$160.74
To gold bullion deposited..... oz.	6,870.521	127,823.66	By payment for deposits in gold coin.....		126,816.48
To silver bullion deposited..... oz.	1,807.65	903.83	By payment for deposits in silver bars.....		893.76
To silver bullion purchased..... oz.	37.60	18.80	By payment silver purchases in silver coin.....		1,126.84
To silver bullion parted..... oz.	2,221.29	1,110.66	By payment of transfer orders.....		5,000.00
To seigniorage on silver coinage.....		432,302.39	By warrants in favor of the Treasurer U. S.:		
To transfer orders received.....		2,744,144.67	No. 2257, dated June 30, 1898.....	$154,833.68	
			No. 2262, dated June 30, 1898.....	9.17	
			No. 46, dated July 15, 1898.....	420.03	
					155,262.88
					289,260.70
			By C. W. Boothby, his successor in office, for this sum transferred to him and with which sum the said Boothby is to be debited (receipt filed herewith):		
			Gold bullion, oz. 29,225.023.....	543,721.51	
			Silver bullion, oz. 2,056,813.16.....	1,803,380.73	
			Gold coin.....	1,500.00	
			Silver coin.....	1,623,051.43	
					3,971,653.67
		$4,260,914.37			4,260,914.37
		954,610.36			
		3,306,304.01			

No. 17655 (Miscellaneous).

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR FOR THE TREASURY DEPARTMENT, *January* 21, 1899.

I hereby certify that I have examined and settled an account between the United States and Overton Cade, superintendent of the U. S. mint at New Orleans, La., from April 1st, 1898, to August 4, 1898, for gold and silver bullion deposited and purchased under his bond approved Oct. 7, 1897, and find that there is no balance.

$0, — dollars.

(Signed)

W. E. ANDREWS,
Auditor for the Treasury Department,
By E. McKITTERICK,
Deputy Auditor.

M.

To the Secretary of the Treasury, division of book-keeping and warrants.

Office of the Secretary of the Treasury, division of book-keeping and warrants.

Entered in Ledger No. 105, page 481; date, Jan. 21, 1899.

(Signed)

L. G. WARFIEND.

(Indorsed:) P 5. Form No. 520. No. 17655 (miscellaneous). Certificate of settlement by the auditor for the Treasury Department on account of Overton Cade, supt. U. S. mint, New Orleans, from April 1, 1898, to August 4, 1898. Bullion. To the Secretary of the Treasury, division of book-keeping and warrants. Gold ctf. filed, room 41. 138, vol. 2.

Statement.

Treasury Department, Auditor for the Treasury Department. Form No. 520, ed. 32,397,500.

Debit.		
To Overton Cade, his predecessor in office, for this sum received from him as per audit No. 17655		3,971,653 67
To gold bullion deposited	oz. 2,206.635	41,053.64
To gold bullion parted	.108	2.01
To silver bullion deposited	340.75	170.38
To silver bullion purchased	5.40	2.70
To silver bullion parted	659.46	329.70
To seigniorage on silver coinage		207,264.16
To transfer orders received		1,677,719.11
This sum transferred from supt.'s contingent expenses acc't to reimburse this acc't for loss on sale of sweeps.		335.54
		$5,898,528 91
		3,971,653.67
		1,926,875.24

Credit.		
By payments for deposits in gold bars		285.78
By payments for deposits in gold coin		40,806 76
By payments for deposits in silver bars		168.65
By payments silver purchases in silver coin		335.02
By difference between the assay and proceeds of sweeps sold		333.54
By payments of transfer orders		375,080.00
By warrants in favor of the Treasury- U. S.:		
No. 2140, dated Sept. 30, 1898	$292,714.23	
No. 2140, dated Sept. 30, 1898	182,946.40	
No. 1126, dated Oct. 20, 1898	384.81	
No. 715, dated Dec. 3, 1898	7.34	
		476,052.78
		893,062.53
Balance due the United States:		
Gold bullion, oz. 31,388.283	583,968.18	
Silver bullion, oz. 2,442,507.09	1,997,612.33	
Gold coin	37,270.00	
Silver coin	2,386,615.87	
		5,005,466.38
		$5,898,528.91

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No. 17751 (Miscellaneous).

TREASURY DEPARTMENT,
OFFICE OF THE AUDITOR FOR THE TREASURY DEPARTMENT, *January* 28, 1899.

I hereby certify that I have examined and settled an account between the United States and C. W. Boothby, superintendent of the U. S. mint at New Orleans, La., from August 5, 1898, to September 30, 1898, for gold and silver bullion deposited and purchased under his bond approved August 1, 1898, and find that there is due to the United States a balance of five million five thousand four hundred sixty-six and $\frac{38}{100}$ —.

(Signed)

W. E. ANDREWS,
Auditor for the Treasury Department,
By E. McKITTERICK,
Deputy Auditor.

To the Secretary of the Treasury, division of book-keeping and warrants.

Office of the Secretary of the Treasury, division of book-keeping and warrants.

Entered in Ledger No. 105, page 481; date, Jan. 28, 1899.
(Signed) L. G. WARFIEND.

(Indorsed:) P 6, B C. Form No. 520. No. 17751 (miscellaneous). Certificate of settlement by the auditor of the Treasury Department on account of C. W. Boothby, supt. U. S. mint, New Orleans, from Aug. 5, 1898, to Sept. 30, 1898. Bullion. To the Secretary of the Treasury, division of book-keeping and warrants. 139, vol. 2.

Gold coin.

August 4:		Sept. 30:	
To balance from former summary	1,500.00	By coin paid for deposits and partings	40,543.25
Sept. 30:		By coin paid for deposits of previous quarter	263.51
To gold exchange for silver coin	26,026.76	By charges deposited at subtreasury { 384.81 / 7.34 }	392.15
To net proceeds sale of gold in sweeps sold	339.19	By coin exchanged and counter	6.22
To net proceeds sale of silver in sweeps sold	275.64	By balance	37,270.00
To am't transfer'd to cover loss in gold in sweeps sold	184.01		
To am't transferred to cover loss in silver in sweeps sold 333.54	149.53		
To am't received on transfer order No. 34026	50,000.00		
	78,475.13		78,475.13

Silver coin.

August 4:		Sept. 30:	
To balance from former summary	1,622,196.03	By coin paid for mut. coin and partings	332.40
Sept. 4:		By coin paid for mut. coin and partings previous quarter	2.62
To standard silver dollars manufactured	680,000.00	By coin paid on transfer orders, Treasury notes	2,000.00
To fractional silver coin	485,000.00	By coin paid on certificates of deposit, F. S. coin	373,080.00
To coin transferred	475,660.63	By coin profits deposited — U. S. Treasury	475,660.63
To special silver assay coins returned	44.00	By coin exchange for gold	26,026.76
To exchange and counter	6.22	By annual assay coins reserved	582.50
		By special assay coins reserved	31.20
		By balance	2,385,190.77
	$3,262,906.88		3,262,906.88

(Signed) C. W. BOOTHBY, *Superintendent.*

(Indorsed:) P 7. Mint of the U. S., New Orleans, La. Summary of operations, coin, quarter ended September 30, 1898. C. W. Boothby, superintendent.

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THE UNITED STATES.

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Summary of Operations, Quarter Ended September 30, 1898, U. S. Mint, New Orleans, La.—for the Period of the Quarter from Aug. 4 to Sept. 30, 1898.

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Gold bullion.

	St'd ounces.	Cost.		St'd ounces.	Value.
August 4:			Sept. 30:		
To balance from former summary	29,225.023	543,721.51	By net proceeds gold in sweeps sold during the quarter	28.122	339.19
Sept. 30:			By loss on sweeps sold during the quarter		184.01
To deposit of the period of the quarter	2,206.635	41,053.64	By fine bars paid deposits during the quarter	15.361	258.78
Partings	.108	2.01			
			Balance	31,388.283	583,968.18
	31,431.766	584,777.16		31,431.766	584,777.16

Silver bullion purchased under acc't, July 14, 1890.

August 4:			Sept. 30:		
To balance from former summary	1,731,864.68	1,400,786.26	By new coins manufactured during the period of the quarter	584,375.00	670,000.00
Sept. 30:			By balance	2,404,387.69	1,951,745.98
To bullion rec'd on T. O.'s during the period of quarter	1,256,898.01	1,023,695.56			
To seigniorage of the period of the quarter		207,264.16			
	2,988,762 69	2,631,745.98		2,988,762.69	2,631,745.98

Silver bullion purchased for subsidiary coin.

August 4:			Sept. 30:		
To balance from former sum ary	2,279.04	1,139.52	By net proceeds silver in sweeps sold during period	850.35	275.64
Sept. 30:			By loss on sweeps sold		149.53
To mut. coin purchased during the period.	5.40	2.70	By balance	2,097.01	1,048.49
To partings *of* during the period	659.46	329.70			
To bar charges and fractions during the period	3.46	1.73			
	2,947.36	1,473.66		2,947.36	1,473.66

August 4:			Sept. 30:		
To balance from former summary.....	322,669.44	401,454.94	By new coins mfgd. during the period of the quarter.....	389,818.75	485,000.00
To bullion rec'd on T. O.'s during the period of the quarter.....	103,171.70	128,362.92	By balance.....	36,022.39	44,817.86
	425,841.14	529,817.86		425,841.14	529,817.86

Silver-deposit bullion.

Sept. 30:			Sept. 30:		
To deposits of the period of the quarter...	340.75	170.38	By fine silver bars paid depositors during the period.....	337.29	168.65
			By bar charges and fractions of the period.....	3.46	1.73
	340.75	170.38		340.75	170.38

(Signed) C. W. BOOTHBY,
Superintendent.

(Indorsed:) P 8. Mint of the U. S., New Orleans, La. Summary of operations. Bullion. Quarter ended September 30, 1898. C. W. Boothby, superintendent.

U. S. mint, New Orleans, La.

DR.

1898.				1898.		
June 30.	Gold bullion	27,392.463	509,627.36	June 30.	Bullion fund	371,956.61
	Silver bullion purchased under act Jul- 14, 1890	1,998,270.93	1,616,263.95		Unpaid deposits	73.79
	Silver bullion purchased for subsidy coin	1,762.93	881.46		Silver profit fund	182,946.40
	Uncurrent silver coin for recoinage	463,305.89	576,430.31			
	Gold coin	.....	18,355.00			
	Silver coin	.....	1,155,524,72			
	Silver assay coin	.....	550.00			
	Special silver assay coin	.....	44.00			
			3,877,676.80			
	Deficiency burnt money	.....	25,000.00			
			3,902,676.80			$3,902,676.80

(Signed) OVERTON CADE,
Superintendent.

BUREAU OF THE MINT, *Aug.* 6, 1898.

These accounts have been examined and approved.
(Signed) B. F. BUTLER,
Acting Director.

(Indorsed:) P 9. Mint of the U. S., New Orleans, La. Balances, quarter ended June 30, 1898. Overton Cade, superintendent.

231 *Defendants' Offerings.*

Deposition of Andrew Woods Smyth, taken on the 5th day of June, 1899, before P. T. Rouger, United States consular agent, port of Londonderry, Ireland, under a commission dated May 3rd, 1899, issued out of the clerk's office of the circuit court of the United States, eastern district of Louisiana, in the case of The United States *vs.* Andrew Woods Smyth *et als.*, No. 12329 of the docket, on behalf of defendants, returned and filed June 19, 1899, at New Orleans, La., and offered by defendant and filed December 7th, 1899; made part of bill of exceptions.

First interrogatory. What is your name, age, residence and occupation?

Answer. Andrew Woods Smyth, 66 years, residing at present at Donemana, County Tyrone, Ireland; occupation or profession, physician or surgeon.

Second interrogatory. What position did you hold under the United States Government in the mint in June, 1893? State where the currency of the mint was deposited, under whose control? Who had access to the vault, and the care and actual custody of said currency of the United States?

Answer. Held the position of superintendent of the mint at New Orleans, La., in June, 1893. The currency of the mint was deposited in the cashier's vault; it was virtually under my control, but it was actually under the control and custody of James M. Dowling, who alone had access to the vault I held, however, in cast of contingencies, a combination of the locks of the vault in a sealed envelope, which seal was never broken; this envelope sealed and unopened was handed to the United States Treasury agent.

Third interrogatory. What occurred in the vault of the cashier of said mint between Saturday, June 24th, and Monday June 26, 1893? What money, if any, was destroyed charred, burned or damaged? Where was said money at the time? What became of the box containing the same?

Answer. Between Saturday, June 24th, and Monday, June 26th, 1893, a fire occurred in the cashier's vault. Several packages of Treasury notes were destroyed, charred, burned and damaged. The packages of notes were in a tin bank box in the vault. This box is in the mint at New Orleans, unless removed.

Fourth interrogatory. If in answer to the previous interrogatory you say that a fire occurred in the vault of the cashier of said mint between Saturday, June 24th, and Monday, June 26th, 1893,
232 state how and in what manner said fire originated? What injury, if any, did it do to the money or property of the United States, and in whose care was said money and property at the time?

Answer. The fire, in my opinion, originated in a waste-paper box in the vault. There were several packages of U. S. Treasury notes burned, but no*t* other property of the United States was injured. The money was in the care and custody of the cashier, James M. Dowling.

Fifth interrogatory. This suit is brought by the United States to recover from Andrew Woods Smyth and the sureties on his official bond as superintendent of the United States mint at New Orleans, Louisiana, to declare said official bond forfeited and to recover from defendants, *in solido*, the sum of twenty-five thousand dollars ($25,000), with 6 per cent. per annum interest from April 1, 1893, until paid, for an alleged deficiency of said sum of twenty-five thousand dollars. Defendants claim "that the alleged deficiency of Andrew Woods Smyth, as the superintendent of the mint of the United States at New Orleans, Louisiana, was occasioned by a fortuitous event, to wit: a fire, in no way attributable to said superintendent or his employés, which occurred in the vault of the cashier of said mint between Saturday, June 24th, and Monday, June 26, 1893, by and through which event the said amount sued for in the currency of the United States mint was charred, burned and destroyed, and the box containing the same was subsequently turned over to and taken charge of by the agents and the representatives of the United States Government." State all you know beneficial to the defendants herein, as if though specially interrogated in relation thereto.

No answer.

(Signed) ANDREW WOODS SMYTH. [L. S.]

Signed in presence.—

(Signed) P. T. ROUGER,

[SEAL.] *U. S. Consular Agent, Londonderry, Ireland.*

Cross-examination:

First cross-interrogatory. How long were you superintendent of the U. S. mint at New Orleans, Louisiana?

Answer. I was about 8 years superintendent of the United States mint at New Orleans, Louisiana.

Second cross-interrogatory. When did you appoint James M. Dowling cashier in said mint and how long did he serve?

Answer. In July or August, 1889, I appointed James M.
233 Dowling cashier in said mint; he served four years as cashier.

Third cross-interrogatory. In what vault in said mint did the fire occur between Saturday, June 24th, 1893, and Monday, June 26th, 1893? Please describe this vault. If old or new at that time? If it was a proper vault in which to deposit the moneys of the Government in your custody as superintendent, and your reasons for considering it a safe and proper vault for such use.

Answer. A fire occurred in the cashier's vault between Saturday, 24th June, and Monday, 26th June, 1893.

The vault is a steel-plate safe, about 5 feet by 10 feet and 7 feet in height; it was new and just completed. I considered it a very perfect and proper vault in which to deposit the moneys of the United States Government.

Fourth cross-interrogatory. Do you know what moneys were deposited in said vault?

Answer. Yes; it contained all the gold coins of the mint; and all the paper currency, also some silver coins and fractional silver coins for daily use in the mint.

Fifth cross-interrogatory. When was the last time you visited said vault before the discovery on Monday, June 26th, 1893, that a fire occurred in the same?

Answer. I visited the vault almost daily. I would say on Friday, the 22d, or Saturday, 23d June, 1893.

Sixth cross-interrogatory. At the time of your last visit to said vault before June 26th, 1893, did you see a large wooden box in said vault, containing kindling wood, paper and candles? If so, did you order that this box and contents to be removed? Did you, on your said last visit see matches on the wooden shelving? If so, what orders did you give as to these matches, and state in this connection all you did to safely keep all moneys or bullion which were for the use or expenses of the said U. S. mint, deposited in said vault, at the time of and before said fire, and in what manner you supervised the acts, omissions or negligence, if such shall be proven on the trial of this case (and which the plaintiff proposes to show), of the said cashier, James M. Dowling?

Answer. I saw a wooden box in the cashier's vault; not to say a large box, about 2 feet long by 1 foot wide and deep. The box was for holding waste paper, wrappage, envelopes and twine. I saw no kindling wood or candles in the box, and I did not order the box to be removed. I always saw matches and candles on the wooden shelving of the vault; they were in constant use to seal money packages to be sent by express. The bullion of the mint is
234 in care and under the control of the melter and refiner and the coiner. The moneys of the mint are deposited in a number of vaults, holding from ten millions to two millions dollars each; there are five silver-coin vaults and five bullion-coin vaults in the mint. I never saw any acts of carelessness or negligence on the part of the cashier, James M. Dowling; on the contrary, the cashier was always careful and attentive to his duties.

Seventh cross-interrogatory. Did you see on the "ash heaps" in the mint grounds, on Monday, June 26th, 1893, a large wooden box? State all you know about this box. Its contents. Describe said box. Give the names of the persons who were at said "ash heap." If you examined said box and contents at the "ash heap." Did you see on the "ash heap" any kindling wood, paper, and &c., similar to the contents of the box? Did you see any candles in said box; if so, how many? State if said box was burned or charred or smoked. State if said box had a lid attached or hinged to it. State what you did with this box. State, if you knew as superintendent of the mint, where this box came from. Who brought it to the "ash heap"?

Answer. On Monday, June 26th, 1893, I saw on the ash heap in the mint grounds a wooden box about 2 feet long and 1 foot broad and deep. I was told that the box came from the cashier's vault. It contained a quantity of burned paper, some pieces of burned wood, what is called kindling wood, and a piece of a candle. The box

was a common deal packing box; a number of mint employés were examining the box at the time; but I cannot now remember their names. I examined the box and contents at the ash heap; some of the contents of the box were thrown out on the ash; the box and its contents were partly burned, charred and smoked. The box had a lid attached to it; I sent the box to my office. I was told that the cashier and a clerk brought the box to the ash heap.

Eighth cross-interrogatory. When you learned of the fire in the vault, Monday, June 26th, 1893, did you go to the vault in which the fire took place, before you went to the "ash heap?"

Answer. I went to the vault before going to the ash heap.

Ninth cross-interrogatory. When you visited the vault in the cashier's office, describe what you saw and found in the cashier's office and in said vault in said office.

Answer. I saw a tin box on the floor of the cashier's office.

Tenth cross-interrogatory. On Monday, June 26th, 1893, did you see a large tin box on the floor of the cashier's office? If so, describe the condition and contents. Also state if you saw any money
235 in said tin box, the appearance of said money. How you examined the box and contents. What did you, as superintendent of the mint, do with this tin box, on that day, and at other times? State all you know about this box and its contents.

Answer. On Monday, June 26th, 1893, I saw a tin bank box on the floor of the cashier's office; a box about 10 inches by 8 inches and five inches deep; the box had evidently been in a fire; the lacquer or paint was burned of- (off) it, the hinges were unsoldered and the box open. I saw packages of Treasury notes in the box; some of the packages were charred completely and some were only partially burned. I saw that there had been a fire in the vault; it was still full of smoke; some bags of gold and silver coin were burned and the coins were scattered on the floor.

I looked very carefully at the box, but I did not touch or handle it at that time or any other time subsequent thereto.

Eleventh cross-interrogatory. Do you know how much money was in this tin box before you saw it on the floor of the cashier's office? If so, do you know how much money was in this tin box when you saw it on the floor of the cashier's office? Did you know that there was some money in this box when you saw it on the floor of the cashier's office?

Answer. I do not know how much money was in the tin box before I saw it on the floor of the cashier's office, nor do I know how much money was in it when I saw it on the floor of the cashier's office. I saw packages of burned and charred bank notes in the box.

Twelfth cross-interrogatory. After examining this tin box and contents did you not deliver it back to cashier, James M. Dowling and have it replaced in the said vault? If yea, please state how you delivered it or had it placed back in said vault. In a sealed or unsealed package?

Answer. After I had looked at the tin bank box the cashier himself returned it to the vault.

Thirteenth cross-interrogatory. When you visited the cashier's office on the 26th of June, 1893, did you go in the vault, in which the fire is said to have occurred, did you examine it? State the result of your examination. What you saw and found in said vault, also fully describing said vault.

Answer. I looked into the vault on Monday morning, June 26th, 1893, but did not examine it, as gold and silver coins were scattered over the floor and the vault was filled with smoke. When the cashier collected the coins I examined the vault and I saw nothing in the vault to account for the fire. The vault was a new steel double-plate room or safe; it was lighted by incandescent electric lamps.

236 Fourteenth cross-interrogatory. State all you know about said fire in said vault, and all that you did, as superintendent of the mint, after the discovery of the said fire in said vault on Monday, the 26th of June, 1893, until you were relieved by your successor in office.

Answer. I know that said fire occurred in said vault and that it did the injury I have stated. Immediately after the fire I requested the Director of the Mint at Washington to send experts from the Treasury Department to investigate the origin of the fire, and to examine the burned notes in the tin bank box.

Fifteenth cross-interrogatory. You were a witness for the U. S. and gave evidence on the trial of James M. Dowling, cashier of said U. S. mint, indicted for embezzlement and &c., of the amount herein claimed in this suit, said trial having been had in the U. S. circuit court for the eastern district of Louisiana, during the month of December, 1893, *et seq'r?*

Answer. Yes, I was a witness.

(Signed) ANDREW WOODS SMYTH. [L. S.]

Signed in presence of—

(Signed) P. T. ROUGER,
United States Consular Agent, Londonderry, Ireland.

Plaintiff's Offerings in Connection with Testimony of James M. Dowling, Witness for Defendant, Being the Wooden Box and the Tin Bank Box, the Subjects of His Cross-examination.

NOTE.—Made part of bill of exception No. 1, and to be sent up in the originals along with the transcript of the record.

One lamp with oil and wicks.
One lamp chimney and broken lamp shade.
One bracket.
Some matches, burnt and unburnt.
One smoked basket and contents.

NOTE.—Offered in connection with testimony of Dr. Barrett, recalled in behalf of plaintiff, referred to in bill of exception No. 1, and to be sent up in the originals along with the transcript of the record.

237 *Dr. Barrett's List of Burned Currency at U. S. Mint, N. O., July* 10, 1893, *Marked* 2.

Filed Dec. 12, 1899; referred to — and made part of bills of exceptions.

Schedule of Burned Currency at U. S. Mint, New Orleans, La., July 10, 1893.

		Amount	
	No. of pkg., 1—small box:		
1	$1 silver certificate 1886	.....	$1.00
	No. of pkg., 2—small box:		
1	$2 silver certificate 1891	.....	2.00
	No. of pkg., 3—small box:		
43	$1 silver certificate- 1891	.....	43.00
	No. of pkg., 3—small box:		
20	$2 silver certificate- 1891	.....	40.00
	No. of pkg. 4, R 2—large box:		
Pkg. 12	$1 silver certificate- 1891	$12.00	
" 20	$1 silver certificate- 1891	20.00	
" 3	$1 silver certificate- 1891	3.00	
	8729605		
" 32	$1 8729636 cert. 1891	32.00	
	8729637		
" 20	$1 8729656 cert. 1891	20.00	
	8729677		
" 3	$1 8729679 cert. 1891	3.00	
	8729680		
" 20	$1 8729699 cert. 1891	20.00	
	8729749		
" 9	$1 8729757 cert. 1891	9.00	
	8729758		
" 15	$1 8729772 cert. 1891	15.00	
	8729773		
" 26	$1 8729798 cert. 1891	26.00	
	8729837		
29	$1 8729865 cert. 1891	29.00	
5	$1 numbers gone 1891	5.00	
	8729882		
11	$1 8729892 sil. cer. 1891	11.00	
3	$1 numbers gone " 1891	3.00	
273			$208.00

238 Pasted on slips of paper.

	Box 5—slips:	
	8729714	
3	$1 8729716 sil. cer. 1891	3.00
1	$1 8729722 sil. cer. 1891	1.00

1 $1 8729733 sil. cer. 1891		1.00	
1 $1 8729900 sil. cer. 1891		1.00	
1 $1 8729700 sil. cer. 1891		1.00	
$1 # 8729799 stuck to bottom of tin box		1.00	
		$8.00	$302.00
Am't brought forward			$302.00

Box No. 6—small box:

	Series.		
1 $2 Treas. note	1891	$2.00	
4 $1 Treas. note	1891	4.00	

Treas. note-:

Pkg. 12 $1 numbers gone 4203826	1891	12.00	
Pkg. 7 $1 4203832 4203834	1891	7.00	
Pkg. 14 $1 4203847 4203850	1891	14.00	
Pkg. 8 $1 4203857 4203883	1891	8.00	
Pkg. 10 $1 4203892	1891	10.00	
Pkg. 3 $1 numbers gone	1891	3.00	
59		$60.00	

Envelope pkg. No. 7:

1 bill $500 No. 13945 legal tender 1880		$500.00
1 bill 100 No. 81373 legal tender 1875		100.00
1 bill 50 No. 204018 legal tender 1880		50.00
1 bill 50 No. 54490 legal tender 1880		50.00
1 bill 50 No. 136228 legal tender 1878		50.00
1 bill 50 No. 428393 legal tender 1874		50.00
1 bill 20 number partly gone legal tender 1880		20.00
		$820.00

Box No. 8:

Fragments of $1.00 and $2.00 notes, value not known; think they are portions of other notes that are scheduled.

239 Box No. 9:

Fragments of $1.00 and $2.00 notes, value not known; think they are portions of other notes that are scheduled.

Silver certs	$302.00	$1 & $2
Legal tenders	820.00	$1 & $2
Treasury notes	60.00	
Total	$1,182.00	

Mrs. Rosenberg's List, Marked R 1.

Filed Dec. 13, 1899; referred to in bills of exceptions and made part thereof.

Schedule of Burned Currency at U. S. Mint, New Orleans, La., July 10, 1893.

			Amount.
	No. of pkg., 1—small box:		
1	$1 silver certificate	1886	$1.00
	No. of pkg., 2—small box:		
1	$2 silver certificate	1891	2.00
	No. of pkg., 3—small box:		
43	$1 silver certificate-	1891	43.00
	No. of pkg., 3—small box:		
20	$2 silver certificate-	1891	40.00
	No. of pkg., 4—large box—R 1:		
Pkg. 12	$1 silver certificate-	1891	$12.00
" 20	$1 silver certificate-	1891	20.00
" 3	$1 silver certificate-	1891	3.00
	8729605		
" 32	$1 8729636 cert.	1891	32.00
	8729637		
" 20	$1 8729656 cert.	1891	20.00
	8729677		
" 3	$1 8729679 cert.	1891	3.00
	8729680		
" 20	$1 8729699 cert.	1891	20.00
	8729749		
" 9	$1 8729757 cert.	1891	9.00
	8729758		
" 15	$1 8729772 cert.	1891	15.00
	8729773		
" 26	$1 8729798 cert.	1891	26.00

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	8729837		
29	$1 8729965 cert.	1891	29.00
5	$1 numbers gone	1391	5.00
	8729882		
11	$1 8729892 sil. cer.	1891	11.00
3	$1 numbers gone "	1891	3.00
			$208.00

Pasted on slips of paper.

Box 5—slips:

8729714				
3 $1	8729716 sil. cer. 1891		3.00	
1 $1	8729722 sil. cer. 1891		1.00	
1 $1	8729733 sil. cer. 1891		1.00	
1 $1	8729900 sil. cer. 1891		1.00	
1 $1	8729700 sil. cer. 1891		1.00	
$1 #	8729799 stuck to bottom of tin box		1.00	
			$8.00	$302.00
	Am't brought forward			$302.00

Box No. 6—small box:

		Series.		
1 $2	Treas. note	1891	$2.00	
4 $1	Treas. note-	1891	4.00	
	Treas. note-:			
Pkg. 12 $1	numbers gone	1891	12.00	
	4203826			
Pkg. 7 $1	4203832	1891	7.00	
	4203834			
Pkg. 14 $1	4203847	1891	14.00	
	4203850			
Pkg. 8 $1	4203857	1891	8.00	
	4203883			
Pkg. 10 $1	4203892	1891	10.00	
Pkg. 3 $1	numbers gone	1891	3.00	
			$60.00	

Envelope, package No. 7:

1 note	$500 No. 13945 legal tender 1880		$500.00
1 note	100 No. 81373 legal tender 1875		100.00
1 note	50 No. 204018 legal tender 1880		50.00
1 note	50 No. 54490 legal tender 1880		50.00
1 note	50 No. 136228 legal tender 1878		50.00
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1 note	50 No. 428393 legal tender 1874		50.00
1 note	20 number partly gone legal tender 1880		20.00
			$820.00

Box No. 8:

Fragments of $1.00 and $2.00 notes, value not known; think they are portions of other notes that are scheduled.

Box No. 9:

Fragments of $1.00 and $2.00 notes, value not known; think they are portions of other notes that are scheduled.

Silver certs	$302.00
Legal tenders	820.00
Treasury notes	60.00
Total	$1,182.00

Paper boxes marked from 1 to 9, inclusive, stated by Mrs. Rosenberg, Government expert, to contain the charred and mutilated silver certificates and Treasury notes amounting to $1,182.

NOTE.—Referred to in bill of exception No. 1 and made part thereof.

To be sent up in the originals along with the transcript of record.

242 Recorded Feb. 16, 1894.

No. 300,602. Form 97.

TREASURY DEPARTMENT,
FIRST AUDITOR'S OFFICE, *February* 15, 1894.

I hereby certify that I have examined and adjusted the gold and silver bullion account of Overton Cade, superintendent of the U. S. mint at New Orleans, commencing July 24, 1893, and ending September 3, 1893, under bond- dated July 17 and September 30, 1893, and that he is chargeable as follows:

A. W. Smythe, his predecessor in office, for this amount received from him per report No. 299,997.		15,984,537.75
To gold bullion deposited .....oz.	3,316.920	61,710.14
To gold bullion parted from silver.....oz.	84.644	1,574.76
To silver bullion purchased.....	1,147,514.97	753,191.40
To silver bullion parted from gold.....	752.24	484.87
To this amount transferred from the superintendent's parting and refining account to reimburse this account for loss on sale of sweeps.....		341.63
To transfer orders received.....		3,446,128.09
Dollars.....		20,247,968.64
		4,263,430.80

I also find that he is entitled to credit as follows:

By payment of deposits in gold bars.....	341.43
By payment of deposits in gold coin.....	62,643.79
By payment purchases in Treasury notes.....	753,635.39
By payment charges and deductions on bullion trans. to ——	
By payment charges silver distribution expenses.....	632.85
By payment charges loss on sale of sweeps.....	341.63
By payment of transfer orders.....	537,000.00
	1,354,-95.09

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By warrants in favor of the U. S. Treasury, viz:		
No. 1955, dated Sept. 30, 1893		46,093.40
No. 1959, dated Sept. 30, 1893		5.10
No. 924, dated Oct. 13, 1893		335.46
		46,433.96
		1,354,595.09
		1,401,029.05
By balance in the U. S. mint, Sept. 30, 1893:		
Gold bullion, oz. 113,792.452	2,117,069.37	
Silver bullion, oz. 9,992,984.67	7,957,112.22	
Gold coin	898,250.00	
Silver coin	7,724,622.80	
Treasury notes	149,885.20	
		18,846,939.59
Dollars		20,247,968.64

as appears from the statement and vouchers transmitted herewith for the decision of the First Comptroller of the Treasury thereon.

(Signed) R. M. COUSAN,
Acting First Auditor.

H. C. S.

To the First Comptroller.

$18,846,939.59.

I admit and certify the above balance, this 21st day of March, 1894, to wit, eighteen million eight hundred and forty-six thousand nine hundred and thirty-nine $\frac{59}{100}$ —.

(Signed) R. B. BOWER,
Comptroller,
By C. M. FORCE,
Deputy Comptroller.
J. L.

To the Register of the Treasury.

Aps.

(Indorsed:) Register's office, March 22, 1894, received. Registered. No. 300,602. First Auditor's report on the gold and silver bullion account of Overton Cade, superintendent United States mint at New Orleans, from July 24 to Sept. 30, 1893. To the First Comptroller. First Comptroller's office, Feb. 17, 1894. R. & E. To the Register. March 22, 1894. H. C. P. Files R. P.

244 *Motion for New Trial.*

Filed December 18, 1899.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

On motion of William Grant, Howe, Spencer & Cocke, and E. Howard McCaleb, attorneys for the defendants in the above entitled and numbered cause, and on suggesting to the court that there is error in the judgment rendered in this cause on the 14th day of December, 1899, in the following particulars, to wit:

First. That the said verdict, and the judgment rendered thereon, is contrary to the law and the evidence.

Second. That the court erred in directing the jury to find a verdict in favor of the plaintiff.

Third. That the court erred in refusing to instruct the jury that if the twenty-five thousand dollars ($25,000) in Treasury notes of the United States were destroyed by an accidental fire as alleged in the defendants' answer, that the verdict should be for the defendants.

Fourth. The court erred in refusing to instruct the jury in substance that if they found that twenty-five thousand dollars ($25,000) of Treasury notes had been destroyed by fire and that the ashes and debris thereof had been turned over to the representatives of the Government by A. W. Smythe, then that in no case could the verdict of the jury be in favor of the plaintiff for more than nominal damages.

Fifth. That the court erred in refusing to instruct the jury as requested in the special instructions submitted by the defendants and filed in this cause.

Sixth. The court erred in refusing to instruct the jury that in any event they should give the defendants credit for the amount of burnt money found and admitted to exist.

It is ordered, that the plaintiff do show cause, on Saturday, December 23rd, 1899, at 11 o'clock a. m., why a new trial should not be granted to the defendants and the verdict of the jury hereinabove rendered and entered be annulled and vacated.

245 *Order: New Trial Refused.*

Extract from the Minutes, November Term, 1899.

NEW ORLEANS, THURSDAY, *December* 28, 1899.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

This cause came on to be heard at a former day upon the motion filed by the defendants for a new trial herein, and was submitted.

Whereupon the court having duly considered the same, it is ordered that a new trial herein be refused, and that the verdict remain undisturbed.

Judgment: Extract from the Judgment Book.

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, New Orleans Division, November Term, 1899.

NEW ORLEANS, THURSDAY, *December* 28, 1899.

Court met pursuant to adjournment.

Present: Hon. Charles Parlange, district judge.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

By reason of the verdict of the jury herein and in accordance therewith it is ordered, adjudged and decreed that the plaintiff, The United States of America, do have and recover of and from the defendants, Andrew Woods Smyth, William H. Byrnes, administrator of the succession of Edward Conery, deceased, and Mrs. Mary G. T. Stempel, wife of Edward Stempel, in her capacity of guardian of her minor child-, Kate Elizabeth McCan, Fanny Tobin McCan, David Chambers McCan and Charles Patterson McCan, all *in solido*, the sum of twenty-five thousand dollars ($25,000) with six per
246 cent. interest per annum from the first day of April, A. D. 1893, until paid and all costs of suit.

Judgment rendered December 14, 1899.

Judgment signed April 21, 1900.

(Signed) CHARLES PARLANGE, *Judge.*

Petition for Writ of Error and Assignment of Errors.

Filed May 1, 1900.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
A. W. SMYTHE and Others. } No. 12329.

To the honorable the judges of the United States circuit court for the fifth circuit and eastern district of Louisiana:

The petition of Andrew W. Smythe, of William H. Byrnes, administrator of the succession of Edward Conery, deceased, and of Mrs. Mary G. T. Stempel, wife of Edward Stempel and guardian of her minor children, Kate Elizabeth McCann, Fanny T. McCann, David C. McCann and Charles P. McCann, who were defendants in the above entitled and numbered cause, with respect represents:

That there is error to the prejudice of these defendants in the judgment of this court rendered on the 14th day of December, 1899,

on the verdict of the jury, and signed by the court on April 21, 1900, as will more fully appear by the assignments of error hereto annexed and made part hereof.

That your petitioners desire to obtain a writ of error to remove this cause for correction of said errors to the United States circuit court of appeals for the fifth circuit holding sessions at the city of New Orleans.

Wherefore, petitioner prays that the writ of error herewith presented may be allowed and the bond herewith tendered may be approved, and a citation to the plaintiff in this cause duly signed, in accordance with the statutes made and provided, and they pray for general relief.

(Signed) HOWE, SPENCER & COCKE,
ROUSE & GRANT,
Attorneys — Suc'n Conery & A. W. Smythe.
E. HOWARD M'CALEB,
Att'y — Mary G. T. Stempel, Guardian, etc.

247 United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
A. W. SMYTHE and Others. } No. 12329.

Assignment of Errors.

And now comes the defendants in this suit on writ of error to remove the same to the United States circuit court of appeals for the fifth circuit and assign for error in the judgment of the circuit court of the United States, fifth circuit, eastern district of Louisiana, in this cause, the following:

1. The court erred in overruling the exception of no cause of action filed by these defendants on December 3, 1894.

2. The court erred in refusing to charge the jury as requested by the defendant- as follows, to wit: "If the jury believe from the evidence that the money representing the deficiency in the accounts of the defendant A. W. Smythe was stored in a vault provided by the United States for the safe keeping of the public funds in his custody, and that while so stored, the same was destroyed by a fire, and that such fire was accidental and not caused by the fault or negligence of the said A. W. Smythe or the sureties on his official bond, then they will find a verdict for the defendants."

3. The court erred in refusing to charge the jury as requested by the defendants as follows, to wit: "If the jury believe from the evidence that the alleged deficiency of $25,000 was contained in the bank box in said vault in the form of paper currency, viz., United States Treasury notes, and that all of said money was destroyed by fire while so contained in said vault, and that the remains and debris thereof were delivered by Smythe to the proper representatives of the United States Government, who were authorized to receive it, then I charge you that under the evidence the Government has not suffered any substantial damages by the destruction

of its own obligations, and your verdict, if in favor of the plaintiffs, can in no event exceed nominal damages."

4. The court erred in refusing to charge the jury as requested by the defendants as follows, to wit: "The court, having refused the other charges asked for and without any waiver whatever, the defendants ask the court to charge the jury to give credit to the defendants for all the money identified and turned over to the United States."

5. The court erred in granting the motion of counsel for
248 the plaintiff that the court direct a verdict against the defendants and in favor of the plaintiff.

6. The court erred in its judgment and decree entered upon the verdict of the jury in allowing interest on the amount of the principal sum of the judgment, to wit, twenty-five thousand dollars ($25,000) against the defendants Byrnes and Stempel, in their respective capacities, at the rate of six per cent. (6%) per annum from April 1, 1893, until paid, when by the plaintiff's own evidence it appears that no demand was made upon said sureties prior to the 9th day of February, 1894.

7. The court erred in rendering an absolute judgment against the defendant, William H. Byrnes, as administrator of the succession of Edward Conery, deceased, in the sum of $25,000, with interest thereon at the rate of 6 per cent. per annum from April 1, 1893, until paid, and all costs of court, for inasmuch as by law said judgment should have been rendered payable only in due process of administration of said succession of Edward Conery.

And for these and other errors apparent on the face of the record, plaintiffs in error pray that the final judgment of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in this cause be reversed, and that the same be remanded to that court with instructions to grant a *venire de novo* and to be proceeded with according to law, and for such other and further judgment and decree as may be proper in the premises.

(Signed) HOWE, SPENCER & COCKE,
ROUSE & GRANT,
Att'ys for Suc'n Conery & A. W. Smythe.

(Signed) E. HOWARD M'CALEB,
Att'y — Mrs. M. G. T. Stempel, Guardian, etc.

Bond for Writ of Error.

Filed May 1, 1900.

United States Circuit Court, Eastern District of Louisiana.

UNITED STATES
vs.
A. W. SMYTH ET ALS. } No. 12329.

249 Know all men by these presents that we, Andrew W. Smythe, W. H. Byrnes, administrator of the succession of Edw. Conery, and Mrs. Mary G. T. Stempel, wife of Edw. Stempel, and

guardian of minors Kate E. McCan, Fanny, T. McCan, David C. McCan, and Chas. P. McCan, as principals, and Albert Baldwin and Bernard McCloskey of New Orleans, as sureties, are held and firmly bound unto the United States of America in the full and just sum of forty-two thousand dollars, to be paid to the said United States of America, their certain attorney, executors, administrators, or assigns; to which payment well and truly to be made, we bind ourselves, our heirs, executors, administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 1st day of May, in the year of our Lord one thousand nine hundred.

Whereas, lately at a circuit (court) of the United States, fifth judicial circuit, holding sessions in and for the eastern district of Louisiana in a suit depending in said circuit court, wherein the United States of America were plaintiffs and A. W. Smythe, W. H. Byrnes, as administrator of succession of Edw. Conery, and Mrs. M. G. T. Stempel as guardian aforesaid, were defendants, a judgment was rendered against Andrew W. Smythe, W. H. Byrnes as administrator of suc'n of Edw. Conery, and Mrs. M. G. T. Stempel, as guardian, etc., as aforesaid, defendants, and the said A. W. Smythe and W. H. Byrnes and Mrs. M. G. T. Stempel, in their capacities aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of the said circuit court to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing them to be and appear at the United States circuit court of appeals for the fifth circuit to be holden at New Orleans, within thirty days from date thereof:

Now the condition of the above obligation is such, that if the said Andrew W. Smythe, and W. H. Byrnes, and Mrs. M. G. Stempel in their capacities aforesaid, shall prosecute their writ to effect, and answer all damages and cost- if they fail to make their plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) BERNARD McCLOSKEY. [L. S.]
ANDREW W. SMYTHE,
By WM. GRANT, *His Att'y.* [L. S.]
W. H. BYRNE–, *Adm'r,*
By WM. GRANT, *His Att'y.* [L. S.]
M. G. T. STEMPEL, *Guardian,*
Per E. HOWARD M'CALEB. [L. S.]
A. BALDWIN. [L. S.]

Approved for a supersedeas.
(Signed) CHARLES PARLANGE, *Judge.*

250 UNITED STATES OF AMERICA, } ss:
Eastern District of Louisiana, }

Personally appeared A. Baldwin and Bernard McCloskey, who, being duly severally sworn, depose and say that they are the sureties on the within bond; that they reside in the city of New Orleans, La., and are each worth the full sum of forty-two thousand dollars, over

and above all their debts and liabilities and property exempt from execution.

(Signed) BERNARD McCLOSKEY.
A. BALDWIN.

Subscribed and sworn before me this 30th day of April, 1900.
[SEAL.] (Signed) ARTHUR B. LEOPOLD, *Not. Pub.*

U. S. Circuit Court.

No. 12329.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Louisiana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, or some of you, between The United States of America, as plaintiff, and Andrew W. Smythe, and W. H. Byrnes, administrator of the succession of Edw. Conery, and Mrs. Mary G. T. Stempel, wife of Edw. Stempel, in her capacity as guardian of her minor children, Kate E. McCan, Fanny T. McCan, David C. McCan and Charles P. McCan, as defendants, a manifest error hath happened, to the great damage of the said Andrew W. Smythe, and W. H. Byrnes, as administrator aforesaid, and Mrs. Mary G. T. Stempel, as guardian aforesaid, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States circuit court of appeals for the fifth circuit, together with this writ, so that you have the same at New Orleans, Louisiana, within 30 days from the date hereof, in the said United States circuit court of appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States circuit court
251 of appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the first day of May, in the year of our Lord one thousand nine hundred.

E. R. HUNT,
[SEAL.] *Clerk of the U. S. Circuit Court for the Eastern District of Louisiana.*

Allowed by—
CHARLES PARLANGE, *U. S. Judge.*

(Indorsed:) No. 12329. United States *vs.* A. W. Smythe *et als.* Writ of error. Filed May 1, 1900. H. J. Carter, d'y clerk.

THE UNITED STATES OF AMERICA:

Circuit Court of the United States, Eastern District of Louisiana.

The President of the United States to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States circuit court of appeals for the fifth circuit, to be holden at the city of New Orleans, within 30 days from date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, wherein A. W. Smythe, W. H. Byrnes, administrator of succession of Edw. Conery, and Mrs. Mary G. T. Stempel, wife of Edw. Stempel, in her capacity as guardian of her minor children, Kate E., Fanny T., David C., and Charles P. McCan, are plaintiffs in error, and The United States defendant in error, to show cause, if any there be, why the judgment rendered against the said A. W. Smythe and W. H. Byrnes and Mrs. Mary G. T. Stempel, in their capacities aforesaid, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 1st day of May, in the year of our Lord one thousand nine hundred.

CHARLES PARLANGE, *Judge.*

MAY 1, 1900.

Service accepted, citation waived.

F. B. EARHART,
Special Ass't Att'y for the U. S., Def't in Error.

252 (Indorsed:) United States circuit court, eastern district of Louisiana. No. 12329. United States *vs.* A. W. Smythe *et als.* Citation. Marshal's return. No. —. U. S. circuit court, eastern district of Louisiana, New Orleans division. Filed May 2, 1900. E. R. Hunt, clerk.

UNITED STATES OF AMERICA:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana.

CLERK'S OFFICE.

I, Edward R. Hunt, clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, do hereby certify that the foregoing 275 pages contain and form a full, complete, true, and perfect transcript of the record and proceedings had, together with all the evidence adduced on the trial of the case of United States *vs.* Andrew Woods Smyth *et als.*, No. 12329 of the docket of the said court.

The following articles are transmitted in the original, along with the transcript, to wit:

Wooden box containing tin box taken from cashier's office, vault of N. O. mint, after the fire, and offered in evidence Dec. 7, '99; said tin box has the charred remains of a one-dollar bill on the bottom piece.

Charred wooden box containing charred coin box and other articles, to wit, one lamp with oil and wicks; one lamp chimney and broken lamp shade; one bracket; some matches, burnt and unburnt; one smoked basket and contents, found in vault in cashier's office, New Orleans mint; offered in evidence on trial, Dec. 7, 1899, and marked "M."

Paper box containing piece of electric light burner, porcelain shade, articles found in the vault and produced in open court by Dr. Barrett and filed Dec. 12, 1899, including small box containing one burnt match found in tin box.

The paper boxes numbered from 1 to 9, inclusive, containing charred and mutilated money, which is in the custody of the superintendent of the U. S. mint at New Orleans, under order of court, found at page 20½ of the transcript; said paper boxes or packages being enclosed in a wooden box screwed and sealed with sealing wax and marked and labelled on the outside.

Witness my hand and the seal of said court, at the city of New Orleans this 30 day of May, A. D. 1900.

[SEAL.] E. R. HUNT, *Clerk.*

253 I, Charles Swayne, United States judge, sitting in the eastern district of Louisiana, do certify that Edward R. Hunt, whose name is signed to the above certificate as clerk of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, was, at the time of signing said certificate, and is now, the clerk of said court. That said certificate is in due form of law, and that full faith and credit are due to his official attestations as such clerk.

Given under my hand, at the city of New Orleans, in said district, this 30th day of May, A. D. 1900.

CHAS. SWAYNE, *Judge.*

254 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

(Extract from Minutes.)

FEBRUARY 12, 1901.

A. W. SMYTHE vs. UNITED STATES. } No. 950.

This cause was regularly called this day and submitted to the court, after argument, by Mr. Wm. Grant, Mr. W. B. Spencer, and Mr. E. H. McCaleb, for plaintiff in error, and by Mr. F. B. Earhart, for defendant in error.

(Extract from Minutes, November Term, 1900.)

MARCH 19, 1901.

A. W. SMYTHE ET AL. vs. UNITED STATES. } No. 950.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and was argued by counsel.

On consideration whereof it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

255 In the Supreme Court of the United States.

A. W. SMYTHE and Others, Plaintiffs in Error, vs. UNITED STATES OF AMERICA, Defendants in Error.

To the Honorable Edward Douglas White, associate justice of the Supreme Court of the United States of America:

The petition of Andrew W. Smythe, of William H. Byrnes, administrator of the succession of Edward Conery, deceased, and of Mrs. Mary G. T. Stempel, wife of Edward Stempel and guardian of her minor children, Kate Elizabeth McCann, Fanny T. McCann, David C. McCann, and Charles P. McCann, who were defendants in the circuit court of the United States for the fifth circuit and eastern district of Louisiana and the plaintiffs in error in the United States circuit court of appeals for the fifth circuit in the above entitled and numbered cause, with respect represents:

That there is error, to the prejudice of these petitioners, in the judgment and decree of the United States circuit court of appeals, rendered on the 19th day of March, 1901, affirming the judgment of the circuit court of the United States for the fifth circuit and eastern district of Louisiana, rendered on the 14th day of December, 1899, on the verdict of the jury, and signed by said court on April 21, 1900, as will more fully appear by the assignments of error hereto annexed and made part hereof.

That this is a cause arising under the Constitution and the laws of the United States, and one in which the judgment and decree of said United States circuit court of appeals for the fifth circuit, under the terms and provisions of section 6 of an act of Congress approved the 3rd day of March, 1891, entitled "An act to establish circuit court of appeals, and to define and regulate in certain cases
256 the jurisdiction of the courts of the United States, and for other purposes," are not final.

That your petitioners are entitled to and desire to obtain a writ of error to remove this cause for correction of said errors to the Supreme Court of the United States, holding sessions at the city of Washington.

Wherefore petitioners pray that the writ of error herewith pre-

sented may be by your honor allowed, to operate as a supersedeas, and the bond herewith tendered may be approved, and that a citation to the plaintiff in this cause, duly signed in accordance with the statutes made and provided, may issue, and they pray for such further orders as may be proper in the premises, and for general relief.

W. B. SPENCER,
E. HOWARD McCALEB,
WM. GRANT,
Counsel for Plaintiffs in Error.

Endorsed: Petition for writ of error. Filed April 10, 1901. J. M. McKee, clerk.

257 *Bond for Writ of Error.*

ANDREW W. SMYTHE ET AL., Plaintiffs in Error,
vs.
THE UNITED STATES, Defendants in Error.

Know all men by these presents that we, Andrew W. Smythe, William H. Byrnes, administrator of the succession of Edward Conery, and Mrs. Mary G. T. Stempel, wife of Edward Stempel and guardian of minors, Kate E. McCann, Fanny T. McCann, David C. McCann, and Charles P. McCann, as principals, and Albert Baldwin and Bernard McClockey, of New Orleans, as sureties, are held and firmly bound unto the United States of America in the full and just sum of $45,000, to be paid to the said United States of America, their certain attorney, successors, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this first day of April, in the year of our Lord one thousand nine hundred and one.

Whereas lately, at the United States circuit court of appeals for the fifth circuit, holding sessions in New Orleans, in a suit there depending, wherein said Andrew W. Smythe, William H. Byrnes, as administrator of the succession of Edward Conery, and Mrs. Mary G. T. Stempel, as guardian aforesaid, were plaintiffs in error and The United States was defendant in error, a certain judgment was rendered against said Andrew W. Smythe, William H. Byrnes, as administrator of the succession of Edward Conery, and Mrs. Mary G. T. Stemple, guardian, as aforesaid, who were plaintiffs in error in the last-named court, and the said Andrew W. Smythe and William H. Byrnes and Mrs. Mary G. T. Stempel, in their several capacities
258 aforesaid, having obtained a writ of error and filed a copy thereof in the clerk's office of said court, to reverse the judgment in the aforesaid suit, and a citation directed to said United States of America, citing and admonishing them to be and appear in the Supreme Court of the United States, at Washington, in the District of Columbia, within thirty days from the date hereof:

Now, the condition of the above obligation is such that if the said Andrew W. Smythe and William H. Byrnes and Mrs. Mary G. T. Stempel, in their said capacities aforesaid, shall prosecute the writ to effect and answer all damages and costs if they fail to make the plea good, then the above obligation to be void; else to remain in full force and virtue.

ANDREW W. SMYTHE, [L. S.]
By his attorney, WM. GRANT.
MARY G. T. STEMPEL, [L. S.]
Guardian, &c.,
By E. HOWARD McCALEB,
Her Attorney.
WM. H. BYRNES,
Adm'r Suc'n Edw. Conery, Dec'd,
By W. B. SPENCER, *Att'y of Record.*
A. BALDWIN. [L. S.]
BERNARD McCLOSKEY. [L. S.]

Approved:
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

April 5th, 1901.

UNITED STATES OF AMERICA, } ss:
Eastern District of Louisiana, at New Orleans, }

Personally appeared Albert Baldwin and Bernard McCloskey, who, being duly severally sworn, depose and say that they are the sureties on the within bond; that they reside in the city of New Orleans, La., and are each worth the full sum of $45,000 over and above all their debts and liabilities and property exempt from execution.

A. BALDWIN.
BERNARD McCLOSKEY.

Sworn to and subscribed to before me, at New Orleans, Louisiana, this 1st day of April, A. D. 1901.

ARTHUR B. LEOPOLD,
[SEAL.] *Notary Public.*

Endorsed: Writ of error bond. Filed April 10, 1901. J. M. McKee, clerk.

259 In the Supreme Court of the United States.

A. W. SMYTHE and Others, Plaintiffs in Error,
vs.
UNITED STATES OF AMERICA, Defendants in Error.

Assignment of Errors.

And now comes the plaintiffs in error in this suit on a writ of error to remove the same to the Supreme Court of the United States and assign for error in the record, proceedings, judgment, and decree of

the United States circuit court of appeals for the fifth circuit the following, to wit:

1. The said circuit court of appeals erred in affirming the judgment of the circuit court rendered against the said plaintiffs in error and in favor of the defendant in error upon the trial of said cause.

2. The said circuit court of appeals erred in holding that the circuit court committed no error in overruling the exception of no cause of action filed by these plaintiffs in error on December 3, 1894.

3. The said circuit court of appeals erred in holding that the circuit court committed no error in refusing to charge the jury, as requested by the plaintiffs in error, as follows, to wit:

"If the jury believe from the evidence that the money representing the deficiency in the accounts of the defendant A. W. Smythe were stored in a vault provided by the United States for the safekeeping of the public funds in his custody, and that while so stored the same was destroyed by a fire, and that such fire was accidental and not caused by the fault or negligence of the said A. W. Smythe or the sureties on his official bond, then they will find a verdict for the defendants."

260 4. The said circuit court of appeals erred in holding that the said circuit court committed no error in refusing to charge the jury, as requested by these plaintiffs in error, as follows, to wit:

"If the jury believe from the evidence that the alleged deficiency of $25,000 was contained in the bank box in said vault in the form of paper currency, viz., United States Treasury notes, and that all of said money was destroyed by fire while so contained in said vault, and that the remains and debris thereof were delivered by said Smythe to the proper representatives of the United States Government who were authorized to receive it, then I charge you that under the evidence the Government has not suffered any substantial damages by the destruction of its own obligations, and your verdict, if in favor of the plaintiff, can in no event exceed nominal damages."

5. The said circuit court of appeals erred in holding that said circuit court committed no error in refusing to charge the jury, as requested by these plaintiffs in error, as follows, to wit:

"The court having refused the other charges asked for, and without any waiver whatever, the defendants ask the court to charge the jury to give credit to the defendants for all the money identified and turned over to the United States."

6. The said circuit court of appeals erred in holding that the said circuit court committed no error in directing the verdict in favor of the defendant in error and against the plaintiffs in error upon the trial of said cause.

7. The said circuit court of appeals erred in affirming the judgment of said circuit court, entered upon the verdict of the jury, in allowing interest on the amount of the principal sum of the judgment, to wit, $25,000, against the plaintiffs in error, Byrnes and Stempel, in their respective capacities, at the rate of 6 per cent. per annum, from April 1, 1893, until paid, when by the plaintiffs' own

evidence it appears that no demand was made upon said sureties prior to the 9th day of February, 1894.

261 8. The said circuit court of appeals erred in affirming the judgment and decree of said circuit court in rendering an absolute judgment against the plaintiff in error, William H. Byrnes, as administrator of the succession of Edward Conery, deceased, in the sum of $25,000, with interest thereon, at the rate of 6 per cent. per annum, from April 1, 1893, until paid, and all costs of court, inasmuch as by law said judgment should have been rendered payable only in due process of administration of said succession of Edward Conery.

And for these and other errors apparent on the face of the record plaintiffs in error pray that the final judgment of the United States circuit court of appeals for the fifth circuit, affirming the judgment and decree of the circuit court of the United States, fifth circuit and eastern district of Louisiana, in this cause be reversed, and that same be remanded to that court with instructions to grant a *venire de novo*, and to be proceeded with according to law, and for such other and further judgment and decree as may be proper in the premises.

W. B. SPENCER,
E. HOWARD McCALEB, AND
WM. GRANT,
Attorneys for Plaintiffs in Error.

Endorsed: Petition for writ of error and assignment of errors. Filed April 10, 1901. J. M. McKee, clerk.

262 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

(Filed March 19, 1901.)

ANDREW W. SMYTHE ET AL., Plaintiffs in Error,
vs.
THE UNITED STATES, Defendants in Error. } No. 950.

In error to the circuit court of the United States for the eastern district of Louisiana.

Before Shelby, circuit judge, and Newman and Toulmin, district judges.

TOULMIN, *District Judge:*

This is a suit brought by the United States against Andrew W. Smythe and the sureties on his official bond as superintendent of the United States mint at New Orleans, to recover $25,000.00 which it is alleged he received and failed to account for as required by the condition of his bond.

The defendants excepted to the petition on the ground that it did not state a cause of action. The exception was referred to the merits by order of the circuit court. Thereupon the defendants filed

answers of a general denial of the allegations of the petition, and specially that the $25,000.00, the alleged deficiency of defendant Smythe sued for, was occasioned by a fire, in no way attributable to said Superintendent Smythe or his employees, which occurred in the vault of the cashier of the mint, by which event the said sum, in the currency of the United States, was burned and destroyed; that the box containing the same was turned over to the agents and representatives of the plaintiffs for examination and investigation, and that because of the destruction of said currency by fire the defendants were in no way liable in this suit.

Much evidence was offered pro and con upon the issues presented by the answers, but the evidence was without dispute
263 that there was a deficiency of $25,000.00, as shown by defendant Smythe's account with the Government, of the moneys received by him as superintendent of the mint.

It also showed that the Government, by its representative, took possession of the box referred to, and that its expert was able to identify $1,182.00 of charred currency therein, and that the same is still in possession of the Government and deposited in said mint.

There was no exception to or motion to strike out the special defense set up in the defendant's answer, and there was no objection to the introduction of evidence in support of that defense.

On the conclusion of the evidence, the court, on motion of counsel for the plaintiffs, directed a verdict for the plaintiffs, and refused all charges requested by the defendants.

Judgment having been given for the plaintiffs, the defendants bring the case here, and assign errors which raise the following points, to wit:

1. If the money representing the deficiency sued for was destroyed by fire, and such fire was not caused by the fault or negligence of defendant Smythe, the plaintiffs are not entitled to recover.

2. If the alleged deficiency of $25,000.00 was contained in a box in the vault of the mint, in the form of United States Treasury notes, and all said money was destroyed by fire while so contained in said vault, and the remains and debris thereof were delivered by Smythe to the representative of the United States Government who was authorized to receive it, a verdict for the plaintiffs cannot exceed nominal damages.

3. The defendants are entitled to credit for all the burnt or charred money identified and turned over to the United States Government.

4. The defendants were only liable for interest upon the principal from the date of the demand for the same upon the sureties
264 on Smythe's bond, to wit, from February 9th, 1894, and not from April 1st, 1893, the day the money was received by Smythe, as allowed by the judgment.

Since the case of United States *vs.* Prescott, 3 Howard, 538, the first case that came before the Supreme Court involving the question of liability of a receiver of public moneys down to the present time, the court has uniformly held as a general proposition that a bond of an officer charged with the receiving and safe keeping of public moneys until they are legally withdrawn or paid out creates an ab-

solute liability for the moneys that come to his hands. It has always regarded such officer as an insurer of the public money in his hands, and has held that he and his sureties cannot escape liability therefor, although it is stolen or lost or taken by robbery and without his fault.

Where the condition of his bond is to account for and pay over money, or words to that effect, or the condition is to faithfully perform the duties of an office, and a statute describes the duties to similar effect, the officer has been held a virtual insurer of funds coming regularly into his hands, and therefore accountable for an unavoidable loss.

In United States *vs.* Prescott, *supra*, the suit was on the official bond of a receiver of public moneys. The defense was that the money had been stolen from the defendant without his fault or negligence. The court said: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of defendant Prescott arises out of his official bond and principles which are founded on public policy." There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it when required can discharge the bond. * * *

In United States *vs.* Morgan *et al.*, 11 Howard, 154, the suit was against a collector of customs on his bond for Treasury notes
265 received by him. The defense was that they had been lost or purloined without his knowledge or consent. The court held that this was no excuse, and that the defendant was liable for the notes on his bond, and not on any original bailment.

In United States *vs.* Dashiel, 4 Wall., 182, a paymaster in the United States army was sued on his official bond "for the faithful discharge of his duties." His duty was to safely keep all public moneys in his charge and pay them over when required to do so. The defense was that the money had been stolen from him. It was held that this did not exonerate him.

In United States *vs.* Kaehler, 9 Wall., 83, the court said "that in an action on an official bond the right of the Government did not rest on the implied contract of bailment, but on the express contract found in the bond."

The case of Boyden *vs.* United States, 13 Wall., was that of a receiver of public moneys who was sued on his bond. The court said: "Were a receiver of public moneys, who has given bond for the faithful performance of his duties, as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers. * * *

He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception.

There is an established difference between a duty created by law

and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unfor-seen by the contracting parties and not within his control, he will not be excused.

266 The rule has been applied rigidly to bonds of public officers intrusted with the care of public moneys. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands, when required by law, even though the money may have been lost without fault on their part."

The defense set up in the case was that the receiver had been robbed of the public money received by him. The court said: "If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it."

In United States *vs.* Bevans, 13 Wall., 56, the court said: "It is not to be overlooked that Bevans was not an ordinary bailee of the Government. Bailee he was undoubtedly, but by his bond he had insured the safe keeping and prompt payment of the public money which came into his hands. His obligation was therefore not less stringent than that of a common carrier, and in some respects it was greater."

The learned counsel for the plaintiffs in error substantially concede in their argument that until the case of the United States *vs.* Thomas, 15 Wall., 337, the Supreme Court had expressed views adverse to their position in this case, but contend that in the Thomas case the court decided that the liability of a fiscal officer of the United States was that of a simple bailee, notwithstanding the conditions contained in a bond of the character of the one here involved. We do not agree with this contention. We find nothing in the Thomas case overruling the former decisions of the court on the question involved in this suit. Mr. Justice Bradley, speaking for the court, said: "This precise question has not yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the Government in the hands of a public officer, against

267 his will and without his fault, a discharge of his obligation to keep such property safely, and of his official bond given to secure the faithful performance of that duty, and to have the property forthcoming when required?" * * * and decided that the seizing by a public enemy in a state of war of public moneys in the hands of a loyal Government agent, against his will and without his fault, was a sufficient discharge from the obligations of his official bond.

We do not find, as claimed by counsel, that the court held "that the liability of a fiscal officer of the United States was that of a simple bailee." In the course of the opinion Mr. Justice Bradley said that such fiscal officers are nothing but bailees, and added: "But

they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds, it is fixed by special contract; and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same."

Referring to some of the cases herein cited by us, he said: "But in none of them was the defense of overruling necessity interposed. They were all cases of alleged theft or robbery or some other cause of loss which would have been insufficient to exonerate a common carrier from liability. They all concur in establishing one point, however, of much importance, that a bond with an unqualified condition to account for and pay over public moneys enlarges the implied obligation of the receiving officer, and deprives him of defenses which are available to an ordinary bailee."

In some of the cases cited by us the court has in effect held that, while a receiver of public moneys is a bailee, he is not an ordinary bailee, and his obligations and liability do not depend on the law of bailments, but are measured by his bond. His liability is not unlike that of a common carrier, who is responsible for all losses,
268 except they be occasioned by the act of God or the public enemy. Our understanding of the language used in the Thomas case is to the same effect.

Irrespective of the views hereinabove expressed as to the defendant's liability, we think the undisputed evidence showed such want of care on the part of the superintendent's cashier as to have justified the circuit court in directing a verdict for the plaintiff.

The official bond of the defendant Smythe was conditioned for the faithful discharge of his duties. Among those duties was the control of the mint under his official charge and the safe keeping until legally withdrawn of all moneys in his custody. Revised Statutes, sections 3503 & 3506.

He is not relieved from liability to the United States for acts, omissions, or negligence of his subordinates or employés. Revised Statutes, section 3501.

The duties prescribed by the statute are as much a part of the condition of his bond as if the same were written therein. 4 Am. & Eng. Ency. of Law (2 ed.), 681, and authorities cited in note 2.

Under the Revised Statutes, section 951, in suits like this, "no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the Treasury and to have been disallowed in whole or in part," etc.

In this case there was no proof that any claim for credit or set-off was ever presented to the proper officers and disallowed. United States *vs.* Fletcher, 134 U. S., 664; Yates *vs.* United States, 90 Fed., 57.

Besides, where a bond is not one to indemnify against damage, but an affirmative covenant to do specific things, *non damnificatus*, or no damage, is not a good plea. 3 Ency. of Pleading & Practice, 663, and authorities in note 1.

In suits on claims of this character interest of six per centum per annum from the time of receiving the money until it shall be repaid is recoverable. Revised Statutes, section 3624.

We find no error in the ruling of the circuit court and its judgment is affirmed.

269 United States Circuit Court of Appeals, Fifth Circuit, November Term, 1900.

(Filed March 19, 1901.)

ANDREW W. SMYTHE
vs.
UNITED STATES. } No. 950.

NEWMAN, *J.*, concurring:

I concur in the judgment of the court in this case because I think under the evidence the circuit court was clearly justified in directing a verdict for the plaintiff. The evidence not only failed to show proper care of the funds in the hands of the superintendent of the mint, but showed actual negligence on the part of the cashier, which negligence of his subordinate must be charged to the superintendent in this suit.

I do not believe that the liability of public officials on their bonds for funds in their hands is as strict and severe as my brethren hold it to be, and even if so strict a rule prevailed formerly, it was very much modified by the decision of the Supreme Court in the case of Thomas *vs.* United States, 15 Wall., 337, as I read that decision. While it is undoubtedly true that public policy requires quite a strict rule against the holders of public money, it does not, in my opinion, go to the extent announced in the opinion of the majority of the court; but — the facts in this case the action of the circuit court in giving peremptory instructions for the plaintiff was right, and the judgment for that reason should be affirmed.

270 *Certificate.*

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth judicial circuit, do hereby certify that the foregoing 270 pages, numbered from *a* to 269, inclusive, contain a true, full, and perfect transcript of the record and all proceedings had, including the opinion of the court, in the case of A. W. Smythe *et al. vs.* United States, No. 950, as fully and completely as the same now remains of record and on file in my office.

In testimony whereof I hereunto subscribe my name and affix the seal of said circuit court of appeals, in the city of New Orleans, on this the 22nd day of April, A. D. 1901.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk of the U. S. Circuit Court of Appeals, Fifth Circuit.

271 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between Andrew W. Smythe, William H. Byrnes, administrator of the succession of Edward Conery, deceased, and Mrs. Mary G. T. Stempel, wife of Edward Stempel and guardian of her minor children, Kate Elizabeth McCan, Fanny T. McCan, David C. McCan, and Charles P. McCan, plaintiffs in error, and The United States, defendant in error, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 6th day of April, in the year of our Lord one thousand nine hundred and one.

Seal of the Supreme Court of the United States.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Received April 10, 1901. J. M. McKee, clerk.

UNITED STATES OF AMERICA, }
Fifth Judicial Circuit. }

I, J. M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that a true copy of the within writ of error was lodged in my office for the defendant in error on the 10th day of April, A. D. 1901.

Given under my hand and the seal of said court this April 23 1901.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE, *Clerk.*

272 UNITED STATES OF AMERICA, *ss:*

To the United States, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States circuit court of appeals for the fifth circuit, wherein Andrew W. Smythe, William H. Byrnes, administrator of the succession of Edward Conery, deceased, and Mrs. Mary G. T. Stempel, wife of Edward Stempel and guardian of her minor children, Kate Elizabeth McCan, Fanny T. McCan, David C. McCan, and Charles P. McCan, are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Edward D. White, associate justice of the Supreme Court of the United States, this 6th day of April, in the year of our Lord one thousand nine hundred and one.

E. D. WHITE,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Received April 10, 1901. J. M. McKee, clerk.

On this tenth day of April, in the year of our Lord one thousand nine hundred and one, personally appeared William Grant before me, the subscriber, J. M. McKee, clerk of the U. S. circuit court of appeals for the fifth circuit, and makes oath that he delivered a true copy of the within citation to F. B. Earhart, special assistant attorney for the United States on the record in the within-mentioned cause.

WILLIAM GRANT.

Sworn to and subscribed the 10 day of April, 1901.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

J. M. McKEE,
Clerk U. S. Circuit Court of Appeals, Fifth Circuit.

Endorsed on cover: File No., 18,137. U. S. C. C. of appeals, 5th circuit. Term No., 308. Andrew W. Smythe, William H. Byrnes, administrator of the succession of Edward Conery, deceased, *et al.*, plaintiffs in error, *vs.* The United States. Filed April 27th, 1901.

No. 308. 88

Br. of Grant, Spencer, Rouse & McCaleb for P. C.

111

Office Supreme Court
FILED
JUL 31 1901
JAMES H. McKENNEY,
Clerk.

Filed July 31, 1901.

IN THE Supreme Court of United States

OCTOBER TERM, 1901.

No. 308.

ANDREW W. SMYTHE ET ALS., Plaintiffs in Error,

VERSUS

THE UNITED STATES, Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR, WM. H. BYRNES, ADMINISTRATOR, ETC.

WILLIAM GRANT,
WALKER BRAINERD SPENCER,
Attorneys for Byrnes, Administrator.

J. D. ROUSE,
B. McCLOSKEY,
E. HOWARD McCALEB,
Of Counsel.

T. H. THOMASON, PRINT, 526 NATCHEZ STREET, N. O.

IN THE

Supreme Court of United States

OCTOBER TERM, 1901.

No. 308.

ANDREW W. SMYTHE ET ALS., Plaintiffs in Error,

VERSUS

THE UNITED STATES, Defendant in Error.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR, WM. H. BYRNES, ADMINISTRATOR, ETC.

Statement of the Case.

This suit comes into this Court by writ of error to the United States Circuit Court of Appeals for the Fifth Circuit. Suit was brought by the United States in the Circuit Court for the Eastern District of Louisiana against Andrew W. Smythe and the sureties on his official bond as Superintendent of the United States Mint at New Orleans, to recover the sum of $25,000, which, it is alleged, he received as such Superintendent and failed to account for as required by law and the conditions of his bond.

In that court, the plaintiff in error, for exception to the petition, alleged that it did not disclose a cause of action, because other officers of the Mint, charged by law with the

care and custody of the monies of the Mint, had possession of such monies, which never came into the custody of the Superintendent, and were chargeable therewith under their bonds. This exception was referred to the merits by the order of the Circuit Court.

Thereupon, the defendants filed separate answers, each in the following language:

"Now into this Honorable Court comes William H. Byrnes, administrator of the Succession of Edward Conery, deceased, one of the defendants in said cause, by his attorneys, and for answer to plaintiff's petition, denies generally the allegations therein contained.

"And further answering, this respondent alleges and avers, that the amount of $25,000, the alleged deficiency of Andrew Woods Smythe, on his official bond, as Superintendent of the Mint of the United States, at New Orleans, Louisiana, herein sued for, was occasioned by a fortuitous event, to-wit: a fire, in no way attributable to said Superintendent, or his employees, which occurred in the vault of the cashier of said Mint, between Saturday, June 24th, and Monday, June 26th, 1893, by and through which event the said sum in the currency of the United States, was charred, burnt, and destroyed, and the box containing the same was turned over to the agents and representative of the plaintiff for examination and investigation.

"That the destruction of said currency having occurred by such fortuitous event, the said Andrew Woods Smythe, and the sureties on his official bond, are in no way liable or responsible therefor, and said event is not covered by, or included within the terms and conditions of said official bond; all of which will appear more fully and at large, from the evidence which will be exhibited on the trial of this case.

"Wherefore, this respondent prays to be hence dismissed with costs, and for general relief."

Much evidence was offered *pro* and *con* upon the issues tendered by the pleadings.

On the part of the Government, evidence was tendered to show the appointment of Smythe as Superintendent of the Mint at New Orleans; the execution of the bond by the plaintiffs in error; the receipt of various sums of money by Smythe, and his failure to account for a deficiency of $25,000 in United States treasury notes. Further evidence was offered by the Government tending to show that a fire had taken place in the steel vault provided by the Government for the safekeeping of funds in the custody of the Superintendent; that a tin box containing paper currency had been destroyed by fire, and that a count of its contents by the Government experts disclosed that it had originally contained only $1182.

Evidence was offered by the plaintiffs in error, and received and submitted to the jury without objection, tending to show that there was a fire in the vault of the mint, not due to the negligence of the superintendent or his agents and employees; that United States treasury notes to the amount of $25,000, contained in the bank box, were charred, burnt and destroyed; that the Government, through its authorized agents, took possession of the box and the burnt money, and that same had ever since remained in the custody and control of the Government. There was no conflict in the evidence except as to the amount of money contained in the bank box. The Government's witnesses testified that there was only $1182 in the box; whereas, the witnesses of the plaintiffs in error testified particularly that the box, when it was burned, contained $25,000 in United States treasury notes.

Upon the conclusion of the testimony, the court taking the view that the facts set up in the answer, if proven, and

the evidence adduced, would not constitute a defense, directed the jury to find for the United States, and refused all of the charges asked for by the plaintiffs in error.

A writ of error was sued out to review the judgment of the Circuit Court, but, on hearing, the judgment of that court was affirmed, and thereupon the plaintiffs in error brought the case to this Court for a review of the judgment of the Circuit Court of Appeals.

Assignment of Errors.

In this Court plaintiffs in error assigned the following errors in the opinion and decree of the Circuit Court of Appeals (Trans. p. 226) :

1. The said Circuit Court of Appeals erred in affirming the judgment of the Circuit Court rendered against the said plaintiffs in error and in favor of the defendant in error upon the trial of said cause.

2. The said Circuit Court of Appeals erred in holding that the Circuit Court committed no error in overruling the exception of no cause of action filed by these plaintiffs in error on December 3, 1894.

3. The said Circuit Court of Appeals erred in holding that the Circuit Court committed no error in refusing to charge the jury, as requested by the plaintiffs in error, as follows, to-wit :

"If the jury believe from the evidence that the money representing the deficiency in the accounts of the defendant A. W. Smythe was stored in a vault provided by the United States for the safekeeping of the public funds in his custody, and that while so stored the same was destroyed by a fire, and that such fire was accidental and

not caused by the fault or negligence of the said A. W. Smythe or the sureties on his official bond, then they will find a verdict for the defendants."

4. The said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error in refusing to charge the jury, as requested by these plaintiffs in error, as follows, to-wit:

"If the jury believe from the evidence that the alleged deficiency of $25,000 was contained in the bank box in said vault in the form of paper currency, viz., United States treasury notes, and that all of said money was destroyed by fire while so contained in said vault, and that the remains and debris thereof were delivered by said Smythe to the proper representatives of the United States Government who were authorized to receive it, then I charge you that under the evidence the Government has not suffered any substantial damages by the destruction of its own obligations, and your verdict, if in favor of the plaintiff, can in no event exceed nominal damages."

5. The said Circuit Court of Appeals erred in holding that said Circuit Court committed no error in refusing to charge the jury, as requested by these plaintiffs in error, as follows, to-wit:

"The court having refused the other charges asked for, and without any waiver whatever, the defendants ask the court to charge the jury to give credit to the defendants for all the money identified and turned over to the United States."

6. The said Circuit Court of Appeals erred in holding that the said Circuit Court committed no error in directing the verdict in favor of the defendant in error and against the plaintiffs in error upon the trial of said cause.

7. The said Circuit Court of Appeals erred in affirming the jugment of said Circuit Court, entered upon the ver-

dict of the jury, in allowing interest on the amount of the principal sum of the judgment, to-wit., $25,000, against the plaintiffs in error, Byrnes and Stempel, in their respective capacities, at the rate of 6 per cent. per annum from April 1, 1893, until paid, when by the plaintiff's own evidence it appears that no demand was made upon said sureties prior to the 9th day of February, 1894.

8. The said Circuit Court of Appeals erred in affirming the judgment and decree of said Circuit Court in rendering an absolute judgment against the plaintiff in error, William H. Byrnes, as administrator of the Succession of Edward Conery, deceased, in the sum of $25,000, with interest thereon at the rate of 6 per cent. per annum, from April 1, 1893, until paid, and all costs of court, inasmuch as by law said judgment should have been rendered payable only in due process of administration of said Succession of Edward Conery.

And for these and other errors apparent on the face of the record, plaintiffs in error pray that the final judgment of the United States Circuit Court of Appeals for the Fifth Circuit, affirming the judgment and decree of the Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, in this cause be reversed, and that same be remanded to that court for a *venire de novo*.

Points Covered by This Brief.

The errors assigned will be discussed under the following points:

I.

The Circuit Court erred in directing the verdict in favor

of the defendant in error, and in refusing to charge the jury as set forth in third assignment of error. The Circuit Court of Appeals erred in affirming the judgment of the Circuit Court.

II.

The Circuit Court erred in refusing to charge the jury as set forth in the fourth assignment of error, and in holding that the defendant in error was entitled to recover substantial damages under the evidence adduced. The Circuit Court of Appeals erred in affirming the action of the Circuit Court.

III.

The Circuit Court erred in directing the jury to find a verdict for the defendant in error for twenty-five thousand dollars, when the Government's own evidence showed that the deficiency was only $23,818. The Circuit Court of Appeals erred in affirming said judgment.

IV.

The Circuit Court erred in allowing the defendant in error to recover interest on the principal sum from April 1, 1893, and the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in that respect.

V.

The Circuit Court erred in rendering an absolute judgment against Wm. H. Byrnes as administrator, instead of one payable in due course of administration of the succession of Edward Conery, and the Circuit Court of Appeals erred in affirming the judgment of the Circuit Court in that respect.

ARGUMENT.

FIRST POINT.

The Circuit Court erred in directing the verdict in favor of the defendant in error and in refusing to charge the jury as set forth in the Third Assignment of Error. The Circuit Court of Appeals erred in affirming the rulings of the Circuit Court.

(Assignments of Error Nos. 6 and 3).

The general charge directing a verdict in favor of the United States was predicated on the assumption that the destruction by fire of the $25,000 in currency, without the fault of the Superintendent of the Mint, did not relieve him of liability to account for the same under his bond. This question ought to have been raised by objection to the introduction of evidence in support of the answer of the plaintiffs in error, or by a motion to strike out this special defense, which would have saved the expense of bringing up such a voluminous record.

But as the Court has certified the ground upon which the charge was based, we may consider that all evidence tending to support this special defense was withdrawn from the jury. We shall, therefore, for the present address ourselves to the argument of this question. The learned Judge of the Circuit Court seems to have based his ruling on the theory that a bond of an officer charged with the safekeeping of public funds, creates an absolute liability to respond with the money at all events, without regard to the existence of any cause whatever that may prevent his compliance with its condition.

It must be confessed that there are many conflicting de-

cisions on the subject, both in this country and in England, and that until the case of **United States vs. Thomas, 15 Wall. 337,** came before it, the Supreme Court had apparently expressed views somewhat adverse to our position. In that case, however, Mr. Justice Bradley, with his usual learning and research, after a review of a great number of decisions, came to the conclusion that the liability of a fiscal officer of the United States was that of a simple bailee, notwithstanding the conditions contained in a bond of the character of the one here involved. He, therefore, very logically held that the officer did not become a debtor on his bond until he had committed a breach of duty.

In reviewing those cases, he commented on the fact that, in most of them, undue stress had been laid on the terms of the bond, as forming the basis of a new rule of responsibility; and that the learned Judges, in a majority of them, overlooked the vital distinction between an absolute agreement to do a thing, and a condition to do the same thing inserted in a bond. But his conclusion was that in the latter case the obligor is not bound at all events to perform the condition, but is excused from its performance, when prevented by the law, or an overruling necessity. And he cites the rule laid down in such cases by Lord Coke, as follows:

"In all cases where the condition of a bond or recognizance, etc., is possible at the time of making of the condition, and before the same can be performed, the condition becomes impossible by the act of God, or of the law, or of the obligee, etc., there the obligation is saved."

The basis of liability, says the Court in that case, is founded on the doctrine of Bailment:

"A public officer having property in his custody in his

official capacity is a bailee, and the rules which grow out of that relation are held to govern the case. But the Legislature can, undoubtedly, at its pleasure change the common law rule of responsibility. Where, however, a statute merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it cannot, without more, be regarded as enlarging or in any way affecting the degree of his responsibility."

The general rule is well settled that a bailee is excused from liability for property destroyed in his possession by fire.

2 Am. & Eng. Ency. of Law (2 Ed.), 748.

Story on Bailments, Sec. 29.

Meridian Fair vs. North Birmingham, etc., 70 Miss. R. (12 Southern R. 555).

This being the rule, there is no reason why a fire is not as much an overruling necessity in this case as *vis major* was held to be in the Thomas case.

The federal cases cited as establishing a different doctrine, go no further than to hold that a receiver of public money cannot plead theft to relieve himself of liability as an ordinary bailee may. This exception to the general rule is predicated on a supposed public policy, which cannot be said to extend beyond that class of cases, and which certainly has not as yet been applied by the courts to cases where public money has been destroyed by fire, shipwreck, earthquakes, or other overruling causes. Indeed, it was said in **Boyden vs. United States, 13 Wallace, 17,** that if a receiver of public money were an ordinary bailee, he would be relieved by proof that the money had been destroyed by fire, or stolen, or taken by irresistible force.

Mr. Justice Strong, who wrote the opinion, seems to have thought, but erroneously, as was held in the Thomas case, that the bond created a new rule of liability. But as the defense was theft, the decision was no doubt correct, although his construction of the bond was clearly erroneous when tested by the latter decision.

The only case in point recently decided is that of **United States vs. Humason, 6 Sawyer, 199,** in which Judge Deady followed the rule laid down in the Thomas case, holding that loss of public money by shipwreck will relieve an officer from liability to account therefor.

Having proved at the trial that the money in this case was destroyed by fire, the defendants could not be held liable unless the Superintendent of the Mint, or his servants, were shown to have been guilty of negligence.

Whether a fire, the alleged and admitted cause of the loss of the money herein, comes within the class of defenses that may be pleaded by an officer in discharge of his liability, is for the Court to decide.

But whether there has been such negligence as will deprive him of the benefit of the defense, is a question for the jury.

Preston vs. Prather, 137 U. S. 604.

We submit, therefore, that the Circuit Court erred in refusing to charge the jury: "If the jury believes from the evidence that the money representing the deficiency in the accounts of defendant, A. W. Smythe, was stored in a vault provided by the United States for the safekeeping of the public funds in his custody, and that while so stored, the same was destroyed by a fire; that such fire was accidental and not caused by the fault or negligence of the said A. W.

Smythe, or the sureties on his bond; then they will find a verdict for the defendants," as set out in the bill of exceptions No. 2 (Tr. p. 18), and in the assignment of errors (Tr. p. 227).

And also for the foregoing reasons the Court erred in taking the case from the jury and directing a verdict in favor of the United States, as set out in bill of exceptions No. 1 (Tr. p. 16).

SECOND POINT.

The Circuit Court erred in refusing to charge the jury as set forth in the Fourth Assignment of Error, and in holding that the defendant in error was entitled to recover substantial damages under the evidence adduced. The Circuit Court of Appeals erred in affirming the action of the Circuit Court.

(Assignment of Error No. 4).

On the trial of the case in the Circuit Court, the plaintiffs in error offered evidence tending to show that the alleged deficiency was caused by the accidental burning of paper currency amounting to $25,000, while same was contained in a tin box in the vault of the mint; that this currency consisted of United States treasury notes of various denominations. (Test. Smythe, 3d Interrogatory, Trans. p. 205). The testimony of the Government as to the character of this currency was to the same effect (Trans. p. 187), so, as to this latter fact, there was no dispute. Further, the testimony of the plaintiffs in error showed, and same was not contradicted, but, on the contrary, admitted, that the entire debris of this burnt money was delivered by Smythe to the authorized representatives of

the Government, who have ever since held same for the Treasury Department.

While it was admitted by the Government that it did receive the entire burnt contents of this bank box, it offered evidence tending to show that an examination of the debris by its experts disclosed that there had been only $1182 in treasury notes in the box. On the other hand, the testimony offered by the plaintiffs in error tended to show that the box contained $25,000 of United States treasury notes, and so far as the question in hand is concerned, the only disputed fact was the amount of money that had been destroyed in the box.

At the close of the evidence, and under this state of facts, the plaintiffs in error requested the Court to charge the jury as follows:

"If the jury believe from the evidence that the alleged deficiency of $25,000 was contained in the bank box in said vault in the form of paper currency, to-wit., United States treasury notes, and that all of said money was destroyed by fire while so contained in said vault, and that the remnants and debris thereof were delivered by Smythe to the proper representatives of the United States Government who were authorized to receive it, then I charge you that under the evidence the Government has not suffered any substantial damages by the destruction of its own obligations, and your verdict, if in favor of the plaintiff, can in no event exceed nominal damages." (Bill of Exceptions No. 3, Trans. p. 18).

This the court declined to do, for the reason that, in its opinion, the charge requested ignored the elementary distinction between obligations to indemnify and obligations do specific things; that as against the latter obligations the plea *non est damnificatus* would not avail (Trans. p. 22);

and as he considered it beyond all question that the obligation of Smythe's bond was for the performance by him of specific things as contradistinguished from an obligation to indemnify or make good any loss the Government might suffer by a breach of his legal duty, the Circuit Court was of the opinion that the mere breach of duty by Smythe made the obligation of the sureties absolute, and that it was not incumbent upon the Government to prove any damages resulting from such breach; nor was it permissible to the plaintiffs in error to show that the Government had in fact suffered no substantial injury by such breach.

We submit that the fundamental error of the trial court lay in holding that the bond in question was an obligation to do specific things as distinguished from an obligation to repair and make good any damage the Government might suffer by a breach of duty on the part of Smythe or his subordinates, and in treating the penalty of the bond as liquidated damages rather than as a *penalty* properly so-called.

The condition of Smythe's bond as Superintendent of the Mint at New Orleans was, that he "shall faithfully and diligently perform, execute and discharge, all and singular, the duties of said office according to the laws of the United States." (Trans. p. 164). This bond was given under Sec. 3501 of the United States Revised Statutes, which provide, "that the superintendent of each mint shall give a bond for the faithful and diligent performance of the duties of his office." In our view, the bond executed by the plaintiffs in error was an ordinary penal bond obligating them to repair and make good any damage which the Government might suffer by reason of the neglect or breach of duty by

Dr. Smythe or any of his subordinates for whom he would be responsible. We think this is demonstrated:

1st. By a consideration of the character of the obligation and of the purpose of the law under which the bond was given;

2d. By the uniform interpretation which the law and executive officers of the Government have placed upon its conditions; and

3d. By the intepretation which this Court placed upon an obligation of a similar nature in the case of **United States vs. Morgan** in the **11th Howard Reports** and in other cases.

I.

Nature of Obligation and Purpose of Statute.

It may be stated that an official bond differs in no material respect from an ordinary penal bond, except perhaps that the obligation thereof may *always* be satisfied by indemnifying the obligee to the extent of the injury occasioned by its breach. The sum stipulated to be paid has uniformly been held to be a penalty and not an agreed or liquidated damage.

"Whether the amount agreed by a bond to be paid, forfeited, or lost, is a penalty or liquidated damages, is a question which can rarely occur in reference to a strictly official bond. The penalties of those bonds are almost invariably penalties strictly so-called, but in many less regular instruments, which, nevertheless, are bonds upon condition, the question may very well arise." **Murfree on Official Bonds, Section 612.**

A penalty is that sum of money which the obligor in a bond binds himself and agrees to pay in case of a breach of the condition attached to and made part of the obliga-

tion. Originally, upon breach of the condition, the liability for the entire amount of the stipulated penalty became absolute, and the imprudent or unfortunate obligor might be compelled to pay the whole amount of the penalty, although the damage or loss from the breach of the condition was comparatively insignificant. (**2 Blackstone's Commentaries, 341**). Relief against this injustice was afforded, first, by appeal to a court of equity, and afterwards, courts of law following the example of the Court of Chancery, relieved against the penalty of a bond upon condition so far that the principal of the debt, on demand, with interest and costs, should be paid into court. (**Burridge vs. Fortescue, 6 Mod. 60**). By **Statute of 4 and 5 Ann, Chapter 16,** this practice received the sanction of Parliament. In more modern times, the rule was still further relaxed, so that at present the judgment is for the penalty, but to be discharged upon the payment of the debt and damages as assessed by the jury, and the costs of the suit.

The practical effect of these changes in the law is that the penalty of a bond never operates now as a forfeiture, but merely fixes the maximum of the liability of the obligor.

It is undoubtedly true that the courts of this country habitually regard the sums stipulated in a bond of the ordinary form to be paid by the obligor to the obligee as a penalty or security for the performance of the condition, and not as liquidated damages, or an amount absolute to be paid upon its breach. The presumption that the sum named is intended as a penalty, as the maximum to which the obligee can become entitled, can only be controlled by very strong considerations. When an obligor has bound

himself not to exercise a certain trade in a certain place under a penalty stated in the bond, the court will be more inclined than in other cases to regard the sum named, not as a penalty, but as agreed or stipulated damages for the breach of the condition, but, if, having it in their power to make it clear that they meant the sum stated to be liquidated damages, they omit to do so, the character of the transaction will not of itself suffice to induce the court to depart from the general rule, which is to regard such sums so stipulated as mere securities for the performance of the condition.

Davis vs. Gillett, 52 N. H. 126.
Astley vs. Weldon, 2 Bos. & P. 346.
Street vs. Rigley, 6 Ves. Jr. 815.
Price vs. Greene, 16 Mees. & W. 346.
Davies vs. Penton, 6 Barn. & C. 216.
Higginson vs. Well, 14 Gray, 165.
Smith vs. Wainright, 24 Vt. 97.
Richards vs. Edict, 17 Barbour, 260.

The rule on this subject is thus stated by Chief Justice Marshall: "In general, a sum of money in gross to be paid for the non-performance of an agreement is considered as a penalty, the legal operation of which is to cover the damages which the party, in whose favor the stipulation is made, may have sustained from the breach of the contract by the opposite party. It will not, of course, be considered as liquidated damages; and it will be incumbent on the party who claims them as such to show that they were so considered by the contracting parties." **(Tayloe vs. Sandiford, 7 Wheaton, 13).** And it has been said in a Massachusetts case, that it must be proved that the stipulated

sum was liquidated damages, for "it is not always the calling of a sum to be paid for the breach of a contract liquidated damages which makes it so. In general, it is the tendency and preference of the law to regard a sum stated to be paid if a contract is not fulfilled as a penalty and not as liquidated damages; because it may then be proportioned to the loss actually sustained." **(Wallis vs. Carpenter, 13 Allen, 19, 25).**

It is true, however, that the general rule on this subject is to some extent controlled by the question whether the contingency guarded against is single, comprising only a particular specified act in regard to which damages may arise in case of default, or whether the covenant be to perform several things or else to pay the sum specified. In the former case, it is said that although the policy of the courts is, if possible, to view the sum agreed upon as a penalty, yet, unless there are words evincing an intention that the sum reserved in case of a breach shall be due only as a penalty, such sum may be recovered as liquidated damages. **(Swift vs. Crow, 17 Ga. 609; Leighton vs. Wales, 3 Mees. & W. 545).** If, however, the contract be to perform several acts, or else to pay the sum specified, that sum, it is well settled, will always be regarded by the courts as a penalty and not as liquidated damages.

Swift vs. Crow, 17 Ga. 609.

Astley vs. Weldon, 2 Bos. & P. 345.

Kemble vs. Farren, 6 Bing. 141.

Davies vs. Parton, 6 Barn. & Cr. 210.

Niver vs. Rossman, 18 Barbour, 50.

And so rigid is this rule, that although the parties in so many words, and in express terms, stipulate that the sum

inserted in the agreement shall be liquidated damages and shall not be a penalty, the courts will, nevertheless, hold it to be a penalty unless the agreement specify the particular stipulation or stipulations to which the liquidated damages are to be confined. Thus, there was a contract between a theatrical manager and an actor, by which the former agreed to pay the latter for his services 3 pounds, 6 shillings, and 8 pence, every night for a stated period, and that he should have a benefit each season on certain terms, the actor agreeing to be principal comedian in the company for four seasons. And it was agreed that if either party violated the agreement, or any part thereof, or any stipulation therein contained, such party should pay to the other the sum of 1000 pounds, to be liquidated and ascertained damages, and not a penalty or penal sum in the nature thereof. The actor broke his engagement, and the manager obtained a verdict for 750 pounds, subject to be increased to 1000 pounds if the court should be of the opinion that that sum was legally stipulated in the agreement as liquidated damages. There was a rule *nisi* to that effect, which, after argument, the court discharged, holding that the sum of 1000 pounds expressed in the agreement was a penalty and not liquidated damages. **(Kemble vs. Farren, 6 Bing. 141).**

Furthermore, there is a very material distinction which should always be borne in mind, between bonds given to secure the performance of covenants properly so-called, and bonds for the payment of money. In the latter class of cases, whenever the performance of the condition would imply the payment of a sum certain by the obligor to the obligee, the rule is that if the amount due to the obligee

by reason of the breach of the condition, together with the interest thereon, exceeds the penalty of the bond, the judgment will be for the full amount of the bond, interest and costs. **(Lyon vs. Clark, 8 N. Y. 148).** And this rule has been forced and enforced even against a surety. **(Harris vs. Clapp, 1 Mass. 308).** In the former class of cases, where bonds are given for the performance of covenants, and the breach does not imply the payment of a sum certain, and damages do not follow as a mathematical sequence, as in case of interest, it is safe to follow the *dictum* of DeGrey, Chief Justice: "The bond ascertains the damage by consent of the parties. If, therefore, the defendant pays the plaintiff the whole stated damages, what can he desire more?"

Brangwin vs. Parrot, 2 W. Blackstone, 1190.

Clark vs. Bush, 3 Cowen, 151.

A case directly in point is **Higginson vs. Weld, 14 Gray, 165.** In that case H made an agreement with W, a shipowner, as follows:

"It is understood that said ship is on a voyage to Australia, thence to Calcutta, where she is to load for Boston; and H agrees to furnish 150 tons of goods from Calcutta, paying a freight of $14.50 per ton. W agrees that said ship shall be kept in suitable order for the voyage, and that he will receive said freight on the terms named, the damages of sea and fire excepted. Penalty for the non-performance of this agreement by either party $2200."

The Master, in violation of his orders, did not go to Calcutta, but sailed from Australia to another port. It was held that the contract of W was absolute, and was broken by the failure of the vessel to be at Calcutta to receive her cargo. The assignee of H sued for the penalty.

The Court, at page 173, said:

"But further, and applying a rule which is amongst the most important in determining whether the sum named is to be treated as a penalty or as liquidated damages, it appears very clearly by the contract that the penalty named would be alike incurred by the non-performance by either party of any of its numerous stipulations; and that the actual damage caused by a failure to perform some of them might be very trifling in amount and capable of very exact pecuniary estimation. If, for example, the plaintiffs had failed to furnish 5 or 10 tons of stipulated cargo; or if the defendant had failed in some trifling particular to keep the ship in proper order for the voyage, so that one or two packages of goods had been injured, can it be supposed that it was in the contemplation of either that so serious a consequence should follow? The penalty would be the whole of the sum to be paid for a breach of the whole contract; and it would be unjust and oppressive to require either party to pay it for violating any one of the least important items.

"We are then brought to the consideration of the actual amount of damages which the plaintiffs have sustained. The defendant should pay such a sum as would place the other party in as good a pecuniary condition at the time the contract was broken as if it had been performed."

Regarding now in the light of these authorities the terms of the bond itself, we believe that the conclusion is inevitable that the sum stipulated is to be considered a penalty and not an agreed or liquidated damage, and is recoverable only upon proof of damage, and then only to the extent shown.

Section 3501, U. S. Rev. Stat., provides:

"The superintendent * * * before entering upon the execution of their respective offices, shall become bound to the United States with one or more sureties, approved by the Secretary of the Treasury, in the sum of not less than ten nor more than fifty thousand dollars, with con-

dition for the faithful and diligent performance of the duties of his office, * * * and the Secretary of the Treasury may, at his discretion, increase the bonds of the superintendent."

Upon his appointment, Smythe gave bond in the sum of $100,000, with D. C. McCan and Edward Conery as sureties, conditioned "if the said Andrew Woods Smythe shall faithfully and diligently perform, execute, and discharge, all and singular, the duties of said office according to the laws of the United States, then this obligation to be void. * * *"

While the language of the condition of the bond is not in the exact words of the statute, the effect is the same.

There is nothing in the language of the bond to indicate that it was the intention of the parties to make the sum stated liquidated damages, and under the principle laid down in the cases cited *supra*, the Court will not give such an interpretation to the contract unless constrained to do so by the clear and unambiguous language of the contract.

It may be further noted that this bond was not given to secure the performance of a single act, or to secure the payment of a certain sum of money, or even to secure the performance of one or more acts of the same character. It was a general security for the performance of Smythe's official duties, and a reference to the statute defining these duties will show how diversified in character and importance they are. Some of the duties imposed upon him are of great importance, such for example as the care and custody of the bullion and moneys of the mint; and some of minor importance, as for example that he shall forthwith report to the Director of the Mint the names, duties, com-

pensation, etc., of all persons appointed by him. It requires some seven articles of the Revised Statutes (Secs. 3502-3507) to cover in general terms the divers duties of the superintendent. His duties are more particularly and extensively defined in the various regulations which by law the Director of the Mint is authorized to make. A failure to perform faithfully and diligently some of these official duties would entail great loss upon the Government; a failure in respect of others would occasion no damage or loss whatever.

As the bond does not particularize that it was to secure the performance of any particular or specified duties, but was to secure generally the performance of all the official duties of the officer, it must follow, if the lower courts be correct in their interpretations, that the Government has stipulated for liquidated damages in the sum of $100,000, and is as much entitled to this sum for the infraction of the most trivial and unimportant official duty imposed by law upon the superintendent, as for the loss of bullion, or the neglect of the most important duty to be performed by him. We invoke against this interpretation the rule of Kemble vs. Farren, *supra*, and the cases cited in connection therewith, as well as the common sense interpretation of business men managing the affairs of the Government.

In our humble opinion, the purpose for which officers are required to give bond and sureties for the discharge of their official duties is to make the bond a security for any damage that may be sustained by reason of any breach of their official duty. No action can, we submit, be sustained for recovery of substantial damages, unless there have been such damages sustained as would give the party

a right to maintain an action on the case. And to sustain an action on the case, it must appear that the plaintiff has suffered damage, that the defendant has committed a tort, and that the damage is the clear and necessary consequence of the tort. Upon these principles, the neglect of clerks to give notice to guardians to renew their bonds, it has been held, did not make them liable to suits upon their bonds, because the damages would necessarily be uncertain and conjectural, and because a penalty for such neglect was provided by statute. **(Jones vs. Biggs, 1 Jones N. C. 364).**

So, too, it has been held, that although the State may maintain a civil action on a sheriff's official bond for official delinquency in criminal cases, yet, unless some damage result from the breach of the bond, the action cannot be sustained. **(Commonwealth vs. Reed, 3 Bush Ky. 516).**

It could hardly be conceived that it was the intention of Congress, or of the officers of the treasury to make it possible that the Superintendent of the Mint and his sureties should be mulcted for the penalty of his bond for his failure to perform each or any one of the duties fixed by the statute, irrespective of damage to the Government resulting from such failure or neglect of duty. Yet such is the interpretation which the learned trial Judge placed upon this bond, and we think it is only necessary to illustrate his theory to demonstrate its unsoundness. For example, if the Director of the Mint had ordered that the quarter yearly accounts of the Superintendent (Sec. 3504) be filed in his office before the 10th days of January, April, July and October, it would, under the statute, clearly be the legal duty of the Superintendent to so file his accounts, and if not done, there would be a failure or neglect to faithfully or diligently perform

the duties of the office according to the laws of the United States. No damage, however, may have resulted to the Government by the filing of the reports, say, on February 10th instead of January 10th. Yet, if the theory of the lower court be correct, there having been a failure on the part of Dr. Smythe to perform the specific thing required of him by law, the Government could insist on the full penalty of the bond, because the bond, being an obligation to do a specific thing, in his opinion it was not necessary to show that any actual damage had resulted from the breach.

Again, it is the Superintendent's duty to safely keep all bullion and deliver it when legally demanded. Suppose that when called upon to deliver all the bullion he had received, there was a deficiency of a few ounces of gold. Under the ruling of the lower court, the penalty of the bond becomes due, and it would not be incumbent upon the Government to show the value of the gold that was lost nor would its recovery be limited to such value.

We think it perfectly plain that the statute contemplated that the bond was to secure the Government from loss, and to insure the reparation of any loss or damage it might suffer by any failure or neglect of duty on the part of the Superintendent. To place any other construction upon it, considering the manifold and divers duties to be performed by the Superintendent, varying greatly in importance, would be to impute to Congress the intention of not only securing the Government against any loss, but making it possible for such officer to be ruined should he be guilty of the least infraction of the law.

II.

Interpretation of Condition of Such Bonds by the Officers of the Government.

In the second place, the officers of the Government have always construed the condition of such bonds to be an obligation to indemnify. In all the reported cases of suits on bonds of custodians of Government funds or property, your Honors will find that the amount claimed was merely the value of the money, bullion, or things lost or not accounted for, and never the penalty of the bond irrespective of the damage sustained. Even in this case, the Government did not sue for the penalty of the bond, but for the amount of a loss thought to have been sustained by it by the loss or theft of this money. In the **Bobyshell Case, 77 Federal, 944,** it was the value of the bullion lost and not the penalty of the bond sued for. Yet, in that case, if the theory of the trial court is correct, it was not necessary for the Government to show the damage it had suffered by the loss of this bullion, namely, its value, but it could have sued for the stipulated penalty upon the mere failure of Bobyshell to "safely keep until legally withdrawn all * * * bullion which shall be for the use or expenses of the Mint," of which he was Superintendent.

In the cases of **United States vs. Prescott, 3 Howard, 578; United States vs. Dashiel, 4 Wall. 182; United States vs. Koehler, 9 Wall. 83; Boyden vs. United States, 13 Wall. 17; United States vs. Bevans, 13 Wall. 56, and United States vs. Thomas, 15 Wall. 337,** the amount sued for was the damage sustained by the Government and not the penalty of the bond.

We venture the assertion that no case can be found in

which a Court of the United States has for a breach of duty by an accounting officer of the Government held him or his sureties for the penalty of the bond or for any other amount whatever, irrespective of the damages sustained by reason of such breach.

This uniform interpretation of the nature of the obligation of official bonds by the law and executive officers of the Government, who were the ones that prepared the form of the bonds, whose duty it was to enforce the obligation thereof, evidences in a conclusive way the intention that the penalties of such bonds were intended to be *penalties* and not liquidated damages.

III.

Decisions By This Court.

This uniform interpretation by the officers of the Government of the nature of the condition of this bond, no doubt is based upon the decision of the United States Supreme Court in the case of **U. S. vs. Morgan et al., 11 Howard, 154,** which was decided at the December term of 1850, the plain effect of which decision was to hold that a bond for the faithful performance of the duties of a public office was an obligation to indemnify against loss.

In that case, suit was brought by the United States against Thomas Gibbs Morgan and the sureties on his official bond as Collector of the Port of New Orleans to recover the sum of $274,775.17, the amount of certain monies and treasury notes received but not accounted for by him.

The bond sued on was in the usual form and conditioned that said Morgan "has truly and faithfully executed and discharged, and shall continue truly and faithfully to exe-

cute and discharge all the duties of the said office," and the penalty was fixed at $120,000.

It was alleged in the petition of the Government that the condition of the bond had been broken in that said Morgan had not truly and faithfully discharged nor continued truly and faithfully to discharge the duties of the said office, for that as such Collector he had received large sums of money which he had failed or refused to deliver on legal demand. The answer was a general denial. The verdict and judgment was for $60,569.67. The United States sued out a writ of error to the Supreme Court, assigning as error the refusal of the trial court to instruct the jury that the defendants were liable for the loss of certain treasury notes.

Reviewing the action of the trial court in this respect, the Supreme Court, through Mr. Justice Woodbury, said:

"The other instruction presents a question of more difficulty. It was, that the collector was not liable for the treasury notes which he had received for duties if they had been duly canceled, after received, and were put up and ordered to be delivered at the post-office for transmission to the Treasury Department though they were lost or purloined (without his knowledge or consent) before placed in the charge of the post-office.

"A majority of us think that this instruction also was erroneous. It is manifest that, if the notes though canceled for security in keeping them till transmitted, were still to be regarded for any purpose as money, the collector must be considered as liable for their amount till paid to the Department, or actually delivered at the post-office, in conformity with the orders of the Department. It would then be a liability on his bond to pay over what money he had received, as that manifestly had not here been done; or it would be a liability to perform his duty as promised in his oath and bond, and as required by law and treasury in-

structions,—to transmit or pay over the notes, and which, considering them as money, it cannot be pretended he has done. On this it is enough, in support of his continued responsibility, to refer to the United Stales vs. Prescott, 3 Howard, 578.

"But were these notes, when lost, still money?

"It is true that originally they were by law to be received as money. (Act of 12th October, 1837, 5 Stat. at Large, 202, paragraph 6). The fact that he is liable for the interest on these notes after received and canceled, and until they reach the Department, appears to favor the idea that the notes were still, for some purposes at least, to be treated as continuing money between the collector and the Department. (5 Stat. at Large, 203, paragraph 7).

"But if this view be not clearly sustainable, and we doubt whether, under all the circumstances, after canceled, they can be regarded as money, or money's worth, for the purpose of sustaining this action, yet it is clear that they still possess some value as vouchers, and as evidence from the Treasury Department that they have been redeemed.

"It is still clear, also, that, though canceled, the Treasury Department, unless having possession of them, is exposed to expense and loss by their being altered, and the cancellation removed or extracted, and their getting again into circulation, as two did here, and being twice paid by the government.

"For that reason, these notes, though canceled, are, by law and treasury orders, to be transmitted to the Treasury Department, and when received there are to be credited to the collector; but not till then, as a general rule. If the collector, therefore, fails to send them there, or to do all which is proper to get them there, by having them put into the actual possession of some public transmitting agent like the post-office, he fails in his duty; and it is not enough for him to say in justification, as in this case, and as the court below upheld, that he gave orders to the accustomed servant to put them in the post-office.

"That servant was his own agent, and not the Agent of the Treasury Department. He allowed the notes to be lost

or stolen before reaching the post-office. His employer must suffer by his neglect or unfaithfulness rather than third persons. The condition of the bond of the collector has, therefore, in this view never been fulfilled, and *prima facie* he is technically liable for its penalty, and is in justice, as well as law, responsible for the amount of the injury thus caused by himself or his own agent.

"The rule of damages would be the amount of the notes, unless it appeared, as here, that they had been canceled, and unless it was shown that the government had suffered, or was likely to suffer, damage less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial.

"Only that amount rather than the whole bond need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. And if any equities exist to relieve him from that, none of which are seen by us, it must be done by Congress and not the courts of law.

"Anything less than this—any less strict rule, in the public administration of the finances, would leave everything loose or unsettled, and cause infinite embarrassments in the accounting offices, and numerous losses to the government. * * *

"*Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting them in the post-office so as to be returned.* (*5 Stat. at Large, 203*). *But how much this damage was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the*

breach of the condition of his bond, and of his instructions under it." (Italics ours).

The case of **United States vs. Moore, 2 Brock. 317 (26 Fed. Cases, 1301)**, was a suit by the United States upon the official bond of the United States Marshal, conditioned for the faithful performance of his duties as Marshal of the District of Virginia, for the failure of his deputy to serve original process, whereby it was claimed certain debts due the United States were wholly lost. Chief Justice Marshall, sitting in the Circuit Court, held that the measure of liability was the extent of the injury received by the plaintiff produced by the failure of the Marshal to properly perform the duties of his office.

It seems to us that the cases above cited are conclusive of the question in this case, and we submit, therefore, that the foregoing considerations show that the trial court misconstrued the nature of the obligation of the bond here sued on, and that under the terms of this bond the Government had the right to recover only such damages as it might have proven had been occasioned by the breach of duty on the part of Dr. Smythe in not safely keeping this paper currency. And if this contention be correct, then we think it follows that under the evidence the plaintiffs in error were entitled to have the jury instructed as requested by them. For if, as a matter of fact, there were $25,000 of treasury notes or other obligations of the Government in the bank box, and same were burned, and the entire debris thereof was delivered to the Government,

how can it be claimed that the Government has suffered any substantial damages by the destruction of its own promissory notes or obligations? It seems plain to us under such a state of facts that the only loss suffered by the Government was the value of the paper and the expense of printing the notes, and as no evidence was offered to show these items, nothing but nominal damages were recoverable for the technical breach of the obligation to safely keep these notes.

And we submit that the Court erred in refusing to instruct the jury, as requested by the plaintiffs in error, and the judgment should be reversed.

THIRD POINT.

The Circuit Court erred in directing the jury to find a verdict for the defendant in error for twenty-five thousand dollars, when the Government's own evidence showed that the deficiency was only $23,818. And the Circuit Court of Appeals erred in affirming said judgment.

(Assignments of Error Nos. 5 and 6).

The Government in this suit claimed in its petition that there was a deficiency in the paper currency of the Mint amounting to $25,000, which sum it was alleged Smythe had failed to account for and turn over to the Government when demanded. The court directed a verdict against the plaintiffs in error for this amount, in the face of the fact that the Government's own experts and witnesses testified that Smythe had delivered to them burnt or charred bills, representing part of said deficiency, amounting to $1182.

Upon the theory that this was a credit or offset claimed by an officer on or against a debt due the United States,

the Court declined to limit the recovery of the defendant in error to the sum of $23,818. **(U. S. Rev. Stat., Sec. 951).**

(See ruling of court, Trans. page 163).

The claim made by the plaintiffs in error for a diminution of the amount claimed by the Government to the actual amount shown by its own testimony to have been lost, and not accounted for, viz: $23,818, was not, within the meaning of Section 951, the claiming of a credit. The Government itself showed it had no right to recover more than that sum, by proving that all the bullion and currency of the mint had been accounted for and delivered to the proper authorities by Smythe, except $23,818; and it is submitted that the Circuit Court erred in directing a verdict for $25,000.

FOURTH POINT.

The Circuit Court erred in allowing interest from April 1, 1893. And the Circuit Court of Appeals erred in affirming said judgment in that respect.

(Assignment of Error No. 7).

The fire occurred June 24th, 1893, and it was not until February 9th, 1894, that notice of the shortage was served on the sureties as required by the Act of Congress, approved August 8th, 1888, 25th Statute, 377 (Tr. p. 191); and judicial demand was not made until August 7th, 1894. the date this suit was filed.

It was, therefore, clearly error, as sixthly assigned, to decree interest from April 1, 1893. If this suit is, as is claimed by the District Attorney, for the recovery of a penalty for a breach of duty on the part of Smythe, no interest can be allowed, for interest on a penalty, unless expressly

stipulated in the bond or declared by some Statute, is not recoverable. But if it is an action to recover a deposit, as we claim it is, interest is due only from the date when a demand is shown to have been made on the bailee for the money; but as no demand is alleged to have been made prior to the notice of February 9th, 1894, interest is recoverable only from that date. In any view of the case, it is impossible for the Court to sustain a judgment for interest from April 1, 1893, when the money for which the sureties are chargeable, if at all, was not destroyed or lost until June 24th or 26th, 1893.

FIFTH POINT.

It was error to render an absolute, executory judgment against the plaintiff in error, Byrnes. And the Circuit Court of Appeals erred in affirming the judgment in that respect.

If the Court should be of the opinion that the foregoing assignments of error are not well founded, then we submit that it was error, under the law of Louisiana, to render an absolute judgment against an administrator, and for that reason, failing the other assignments, a *venire de novo* should be ordered, unless the Government consent to the modification of the judgment to make same, so far as Byrnes is concerned, payable in due course of administration.

Respectfully submitted,

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No. 88.

Brf. of Atty. Gen. (Beck) for U. S.

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In the Supreme Court of the United States.

OCTOBER TERM, 1902.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR THE UNITED STATES.

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BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

This suit was brought by the United States against Andrew W. Smyth as superintendent of the United States mint at New Orleans and the sureties on his official bond to recover $25,000, which he received and which he did not account for, as the condition of his bond required.

The bond as set forth in the record was conditioned as follows:

> Now, therefore, if the said Andrew Woods Smyth shall faithfully and diligently perform, execute, and discharge all and singular the

> duties of said office according to the laws of the United States, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

Section 3506, Revised Statutes, provides:

> The superintendent of each mint shall receive and safely keep until legally withdrawn all moneys or bullion which shall be for the use or the expenses of the mint.

Section 3501, Revised Statutes, provides:

> The superintendent, the assayer, the melter and refiner, and the coiner of each mint, before entering upon the execution of their respective offices, shall become bound to the United States, with one or more sureties, approved by the Secretary of the Treasury, in the sum of not less than ten nor more than fifty thousand dollars, with condition for the faithful and diligent performance of the duties of his office.

The trial court directed a verdict for the Government as prayed for The contention of the defendants is that the shortage of $25,000 was occasioned by a fortuitous event, to wit, a fire in the vault in which the funds intrusted to the superintendent were kept.

Let us examine briefly the facts as disclosed by the evidence. A short time prior to the date of the discovery of the fire a new steel vault, of modern and approved pattern, was constructed for the use of the superintendent in the storage and protection of the funds intrusted to his keeping. (Record, p. 85.) On Monday morning, June 26, 1893, James M. Dowling,

cashier under Superintendent Smyth, who testified on behalf of the defendants, upon opening the inner door of this vault discovered smoke. He entered the vault and carried out a certain tin box, containing paper money, which had been placed on a wooden box which he testified was used for waste paper and other office accumulations. (Record, pp. 66, 75.) He had left the tin box there when he closed the vault the Saturday preceding, notwithstanding there was an iron safe within the vault sufficiently large to easily admit the tin box. (Record, p. 132.)

To make his negligence still more patent, the cashier had left the cover of the refuse box open, and had placed the tin box across one corner of the open box. This wooden refuse box contained waste paper, twine, wax, the stub of a candle, and a quantity of pine kindling wood (pp. 73, 75, 109, 112). Dowling, with the assistance of Warrant Clerk Gee, carried the wooden box out of the vault, after he had carried out the tin box, and overturned it on an ash pile near by. The box was then more or less charred outside and in, and its contents in a like condition, although the fire had then gone out. It was apparent that what fire there was had been confined principally to this refuse box, which had been constantly in use as a waste box, and with its combustible contents was constantly left in the vault, and the tin box containing the paper money had usually been left thereon. But the negligence does not end here; the shelves of the vault were covered with paper, matches were left about, and a coal-oil lamp

was attached to the side of the vault by a bracket (p 78). Dr. Smyth, the superintendent, knew that all these conditions existed, as he was in and out of the vault several times a day (pp. 77, 78).

Dr. Barrett, the Government expert, who made an examination of the premises immediately after the fire, found a burned match in the tin box (p. 135). He found the coal-oil lamp, which still contained a little oil, on the floor of the vault, and was informed by Dowling that it had not been touched since the fire. The chimney was near the lamp, and not broken; neither was the lamp, which was a metal one, dented in any way; it had been wrenched from its socket, and how this could have accidentally occurred was not explained (p. 128). Inasmuch as the vault was lighted by incandescent lights, it was entirely unnecessary to keep this lamp therein.

Cashier Dowling, whose testimony stood alone and unsupported, said that he was "satisfied" that there was $25,000 worth of all kinds of paper money in the tin box previous to the fire. He did not explain how there happened to be exactly this sum in the box at that time, although he was asked to do so by the court. He claimed that he had received the money from stevedores, who frequently visited the mint in order to get silver dollars to pay off their hands, and who gave him this paper money in exchange for the silver dollars. The falsity of this was shown by the fact that the serial numbers of the notes ran consecutively.

Moreover, Dr. Barrett, the Government expert referred to, and Mrs. L. E. Rosenberg, a lady who had been employed in the redemption division of the Treasury Department since 1863, after making a careful investigation of the contents of the tin box, testified that it contained only $1,182, the serial numbers of notes of different denominations running consecutively. (See pp. 151, 152, 153, 154.) When Dr. Smyth turned over this tin box to Dr. Barrett and Mrs. Rosenberg for examination he informed them that the $500 bill which was then in the box was not there when he first saw the box after the fire (p. 146). Aside from this $500 bill and one $100 bill, four $50's, and one $20, the largest denomination of any bill was $2. Mrs. Rosenberg testified that the bills in the tin box, in her judgment, were new bills. While the bills were charred, and the edges more or less burned, the witnesses had no difficulty in determining with a glass their issue and denomination. They found scarcely a tablespoonful of ashes in the box, and these they testified came from the burned edges of the money. (Rec., p. 146.) In other words, their testimony showed conclusively that, aside from this $500 bill, there was only $682 in the box previous to the fire. After the fire this was not money, but a mass of charred paper. It could no longer circulate as money, and its real character could only be detected by experts.

The issue here is a clean-cut one, as Dr. Smyth, in his final account of July 24, 1893, the date of the transfer of his office, *includes this $25,000 as due the United States.* (Pages 30 and 54.)

ARGUMENT.

I.

DID THE COURT ERR IN DIRECTING A VERDICT FOR THE GOVERNMENT?

The learned judge who directed this verdict, in assigning his reasons therefor, which he made "part of each and everyone of the defendants' bills of exceptions," said:

> It is perfectly clear that the Federal courts have uniformly held that in such a bond as Dr. Smyth's the officer is virtually an insurer and can not be relieved even against an unavoidable loss, except only when the loss occurs by an act of God or of the public enemy and without any neglect or fault on the part of the officer.
>
> *Of course, in the present cause the loss was not unavoidable. Nay, more, it would seem to have been caused by the fault of persons for whom Dr. Smyth was responsible.* But even if in this cause the loss had been shown to have resulted from an accidental or unavoidable cause (no act of God or of the public enemy being involved), Dr. Smyth would still be liable under the clear and uniformly concordant decisions of the Federal courts.
>
> The motives of high public policy which require that United States custodians of public moneys be held to a strict accountability are well stated by Mr. Justice McLean in *United States* v. *Prescott*, 3 How., p. 578, and by Mr. Justice Strong in *Bevans* v. *United States*, 13 Wall., p. 62. (Record, p. 20.)

Toulmin, district judge, in writing the opinion of the circuit court of appeals, after reviewing the authorities bearing upon the questions in issue, sustained the lower court, and added:

> *Irrespective of the views hereinabove expressed as to the defendants' liability, we think the undisputed evidence showed such want of care on the part of the superintendent's cashier as to have justified the circuit court in directing a verdict for the plaintiffs.*

Newman, district judge, who concurred in the result, said:

> I concur in the judgment of the court in this case, because I think under the evidence the circuit court was clearly justified in directing a verdict for the plaintiffs. *The evidence not only failed to show proper care of the funds in the hands of the superintendent of the mint, but showed actual negligence on the part of the cashier, which negligence of his subordinate must be charged to the superintendent in this suit*

According to the undisputed evidence, a modern, steel, fireproof vault had been provided for the protection of this money. A wooden box, into which all sorts of combustible material was thrown and permitted to remain, was kept in this vault by the cashier, with the knowledge of the superintendent. This box was left open, and a tin box containing paper money was left on one corner of it. This was admitted by the cashier, who testified that he frequently left the tin box there. Paper was put on the shelves of the vault; matches, burned and unburned, were thrown or

left about, and a coal-oil lamp was also kept in the vault. This lamp was on the floor after the fire. Had the tin box been placed in the small safe inside the vault its contents could not have been injured. If the wooden refuse box had not been left in the vault and no other combustible material had been permitted to accumulate therein, no fire could have occurred. To permit such conditions to exist as did exist was negligence—negligence so clear and well established that the court could not do otherwise than direct a verdict for the Government.

It is now well settled that "a case may not be left to the jury unless there is evidence which will warrant a verdict in favor of the party producing it." (Enc. Pleading and Practice, vol. 6, p. 678, and the citation of authorities in note 1 from the courts of last resort of many of the States of the Union and several from this court.)

In *Stewart* v. *Lansing* (104 U. S., 505), Mr. Chief Justice Waite adopted the language of the court in *Pleasants* v. *Fant* (22 Wall., 116), where it was said that "if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence was not sufficient to warrant a particular verdict, the jury might be so instructed."

Assuming that this money may have been burned without any fault or negligence on the part of Dr. Smyth, that fact can not be set up as a defense either by him or his sureties on this action on his bond. The principle here contended for is well settled in a leading

text-book, Throop's "Law of Public Officers and Sureties in Official Bonds," published as late as 1892:

> Where, however, there are no statutory provisions rendering the case exceptional, and the bond is in the usual form, conditioned for the faithful performance of the officer's duty, with or without an additional condition for the faithful disbursement and accounting or the like, the courts of the United States and of several of the States regard a receiving and disbursing officer as a debtor for or an insurer of the public money in his hands, and refuse to allow him or his sureties to escape liability therefor, although it is stolen, or lost, or taken by irresistible force and without his fault.
>
> The only exception which the Federal courts have allowed to the liability of the officer and his sureties for money received and not accounted for and paid over, is where the officer was prevented from doing so by the act of God or the public enemy. (Secs. 222, 223.)
>
> A receiver of public money is liable, *virtute officii*, in the absence of a contract, only as an ordinary bailee. But if he executes a penal bond, in which he binds himself to perform the duties of his office without exception, he becomes an insurer; the contract, not the law, makes such an officer an insurer. (Am. and Eng. Enc. of Law (1st ed.), vol. 2, p. 466.)

The contention here made that a custodian of the public funds under his contract evidenced by a penal bond is something more than an ordinary bailee is sustained by a long and unbroken line of Federal adjudications.

United States v. *Prescott*, 3 Howard, 578 (1845), was the first case that came before the court. In it Prescott, a receiver of public moneys at Chicago, was sued on his official bond. The condition of the bond was:

> That the said Prescott has "truly and faithfully executed and discharged, and shall truly and faithfully continue to execute and discharge all the duties of said office according to the laws of the United States; and, moreover, has well, truly, and faithfully kept, and shall well, truly, and faithfully keep safely, without loaning or using, all the public moneys collected by him, or otherwise at any time placed in his possession and custody, till the same had been or should be ordered by the proper department or officer of the Government to be transferred or paid out; and when such orders for transfer or payment had been or should be received, had faithfully and promptly made, and should faithfully and promptly make, the same, as directed," etc.

The defense was that the money had been stolen from the defendant without any fault or negligence on his part. The court, speaking through Mr. Justice McLean, ruled squarely on the question. It said:

> On the part of the defendant it is contended that the defendant, Prescott was a depositary for hire and that unless his liability was enlarged by the special contract to keep safely, he is only subject to the liabilities imposed by law on such a depositary; that the special contract does not enlarge his liability.

> This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant, Prescott, arises out of his official bond and principles which are founded upon public policy.

Then, after reciting the conditions of the bond, Judge McLean continues:

> The condition of the bond has been broken, as the defendant, Prescott, failed to pay over the money received by him when required to do so; and the question is whether he shall be exonerated from the condition of his bond on the ground that the money has been stolen from him.
>
> The objection to this defense is that it is not within the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the Government. How then, can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defense can be sustained. *The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it when required can discharge the bond.* * * *
>
> As every depositary receives the office with a full knowledge of its responsibilities, he can not, in case of loss, complain of hardship. He

> must stand by his bond, and meet the hazards which he voluntarily incurs. (3 Howard, 588–589.)

In *United States* v. *Morgan et al.*, 11 Howard, 154 (1850), the defendant was collector of customs for the district of Mississippi, and his bond was conditioned: That the said Morgan "has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the said office."

The breach was that he had received as such collector certain Treasury notes, which were canceled by him, but afterwards lost or purloined without his knowledge or consent. The Supreme Court held that this was no excuse to a suit upon his bond, and Mr. Justice Woodbury, in delivering the opinion, said:

> The argument which has been pressed to exonerate him (i. e., the collector) even from this extent of liability rests on an erroneous impression that he was acting as bailee and under the responsibilities of only the ordinary diligence of a depository as to the canceled notes, when in truth he was acting under his commission and duties by law as collector and under the conditions of his bond.
>
> * * * * *
>
> He did not receive them (the notes) as bailee, but as collecting officer. He is liable for them on his bond and not on any original bailment or lending.

The next case was *United States* v. *Dashiel*, reported in 4 Wall., 182 (1866). This was a suit against a pay-

master in the United States Army, brought upon his official bond, which was conditioned for "the faithful discharge of his duties. These duties required him to keep safely all public moneys in his charge and pay them over when required to do so."

The defense was that Dashiel had received some money at Charleston, S. C., for the purpose of paying off the troops at Forts Dallas and Capron, Fla., and that, "being compelled to stop at Palatka several days," some $13,000 of this money had been stolen from him. The court below instructed the jury that the theft or robbery was a good defense, provided it did not occur through any fault or lack of proper care and vigilance on the part of the defendant. After a verdict and judgment for the defendant the Government appealed, and the Supreme Court, following *United States* v. *Prescott* and *United States* v. *Morgan*, disposed of the case by saying, through Mr. Justice Nelson, "The question involved in this case has already been twice decided by this court and need not again be examined." (*United States* v. *Dashiel*, 4 Wall., 182.)

United States v. *Keehlen* (9 Wall., 83) was decided in 1869. The defendant was postmaster at Salem, in the State of North Carolina, and his official bond was conditioned that he should (we quote from the report)—

> well and truly execute the office of postmaster, and, among other things, render accounts once in three months and pay all balances, and keep safely, without lending, using, or depositing in banks or exchanging for other funds than as allowed by law, all

> public money at any time in his custody until the same was ordered by the Postmaster-General to be transferred or paid out, and that when such orders for transfer or payment were received that he should faithfully and promptly make the transfer or payment as directed.

The defense was that Keehler, acting under an order from the Confederate States, paid out the money. The court (Mr. Justice McLean) said that it had already been decided more than once (referring to *United States* v. *Prescott*, *United States* v. *Dashiel*, and *United States* v. *Morgan*) "that in an action on an official bond the right of the Government did not rest on the implied contract of bailment, but on the express contract found in the bond;" and, further, that the court could not concede that a citizen who owed allegiance to the United States as an officer thereof was at liberty to turn its money over to an insurrectionary government.

In *United States* v. *Bevans*, 13 Wallace, 56 (1871), the defendant had been the receiver of public money for a land district in Arkansas. His bond was conditioned that he "should have truly and faithfully executed and discharged, and should continue truly and faithfully to execute and discharge, all the duties of the said office."

These duties, the Supreme Court decided, were defined by the acts of Congress and by the Treasury regulations made under those acts. The defense was that the money had been forcibly taken from him by the agents of the Confederate States, but it was also in

evidence that before force had been brought to bear upon him he had paid the moneys over. Mr. Justice Strong, in delivering the opinion—the defendant was held liable—says expressly:

> It is not to be overlooked that Bevans was not an ordinary bailee of the Government. Bailee he was undoubtedly, but by his bond he had insured the safe-keeping and prompt payment of the public money which came into his hands. His obligation was, therefore, not less stringent than that of a common carrier, and in some respects it was greater.

In 1871 the question came again before the Supreme Court in *Boyden* v. *United States*. In this case the United States sued Boyden and his sureties on his bond as receiver of public moneys for a land district in Wisconsin. The bond was given pursuant to an act which provided:

> The receiver of public moneys shall, before he enters upon the duties of his office, give bond with approved security for the faithful discharge of his trust.

And the bond was conditioned (we quote from the report)—

> That if the said Boyden truly and faithfully executed and discharged all the duties of his said office according to law, then the obligation should be void.

The plea was that Boyden had been suddenly beset by some person or persons to him unknown and thrown down and, against all defense that he could make, gagged and bound, and the moneys described in the

complaint violently and without his fault taken from him and carried away. It was decided by the Supreme Court that even this was no defense.

Mr. Justice Strong, in delivering the opinion, said:

> Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire, or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the case of common carriers, and the duty of a receiver, virtute officii, is to bring to the discharge of his trust that prudence, caution, and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. HE MAY, HOWEVER, MAKE HIMSELF AN INSURER BY EXPRESS CONTRACT, AND THIS HE DOES WHEN HE BINDS HIMSELF IN A PENAL BOND TO PERFORM THE DUTIES OF HIS OFFICE WITHOUT EXCEPTION. THERE IS AN ESTABLISHED DIFFERENCE BETWEEN A DUTY CREATED MERELY BY LAW AND ONE TO WHICH IS ADDED THE OBLIGATION OF AN EXPRESS UNDERTAKING. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting
184 party and not within his control, he will not be excused.

After citing various cases in the State courts, Mr. Justice Strong declares that the rule as laid down in *United States* v. *Prescott* must be followed. He says:

> It is true that in Prescott's case the defense set up was that the money had been stolen, while the defense set up here is robbery. But that can make no difference unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it. Inasmuch as plaintiffs in error practically concede that untill the case of *United States* v. *Thomas*, 15 Wall., 337 (1872), the uniform decisions of this court had been adverse to their contention in this case we may be pardoned for considering that decision somewhat at length and its bearing upon the question here in issue.

In the Thomas case the defendants were sued as principal and sureties on the official bond of the surveyor of customs at the port of Nashville, Tenn. "The condition of the bond," says the report, "was in the usual form:"

> That he should faithfully execute and discharge the duties of his office according to law, and should well, truly, and faithfully keep safely, without loaning, using, depositing in banks, or exchanging for other funds than as allowed by act of Congress, all the public moneys collected by him or otherwise placed

> in his possession and custody till the same should be ordered by the proper department or officer to be transferred or paid out; and when such orders for transfer or payment were received, should faithfully and promptly make the same as directed, and should perform all other duties as fiscal agent of the Government which might be imposed by any act of Congress or regulation of the Treasury Department, etc.

The defense was that the moneys sued for had been seized by the Confederate authorities by the exercise of force, which the defendant was unable to resist, and that there was an organized insurrection existing at that time in the State of Tennessee against the Government, and, further, that the defendant had acted in good faith, and that if he had not given up the money in his hands it would have been forcibly taken from him. Counsel admitted the authority of Prescott's case and the later decisions of the court and based the defense solely on the ground that the defendant had been unable to perform his duties because of the act of a public enemy. On this ground, and on this ground alone, the Supreme Court ruled against the Government. Mr. Justice Bradley says in his opinion:

> This case brings up squarely the question whether the forcible seizure, by the rebel authorities, of public moneys in the hands of loyal Government agents, against their will and without their fault or negligence, is or is not a sufficient discharge from the obligations of their official bonds. This precise question has

not as yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the Government in the hands of a public officer, against his will and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty and to have the property forthcoming when required?

* * * * *

That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and, aside from such a bond as exists in this case, seems almost self-evident. If it were not, then every military commander who ever lost a battle or was obliged to surrender his ship or fort or other public property added a civil obligation to his military misfortune. And as regards this question, it is difficult to perceive any distinction between the loss of one kind of property and another. If the property belongs to the Government, the loss falls on the Government; if it belongs to individuals, it falls on them.

The general rule of official obligation, as imposed by law, is that the officer shall perform the duties of his office honestly, faithfully, and to the best of his ability. This is the substance

> of all official oaths. In ordinary cases, to expect more than this would deter upright and responsible men from taking office. This is substantially the rule by which the common law measures the responsibility of those whose official duties require them to have the custody of property, public or private. If in any case a more stringent obligation is desired, it must be prescribed by statute or *exacted by express stipulation.*

The case, so far from disturbing the conclusions in the prior decisions, as our opponents have argued in their briefs, is thus a direct reaffirmance of the doctrine that the execution of an official bond adds an additional and more stringent liability to that of the bailee at common law. It is true that Mr. Justice Bradley does criticise so much of the language of the prior decisions as held that a public official who has given bond is not a bailee. In this connection he says:

> *These provisions show that it is the manifest policy of the law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability.* The legislative anxiety on the subject culminates in requiring them to enter into a bond, with sufficient sureties, for the performance of their duties and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the nonproduction of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when

> they are expressly forbidden to touch or use the public moneys except as directed, would be an abuse of terms. *But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment can not be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds it is fixed by special contract, and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same.* (Pages 346–347.)

It will thus be seen that while the court questions the propriety of the language of prior decisions that public officers are not bailees, yet it subsequently concurs with prior rulings that though they may be bailees, yet the policy of the law, as well as the letter of the bond, imposes much higher obligations than those of a bailee at common law. The use of terms is not important as long as the result is the same.

It is moreover true that the court, in the Thomas case, did say that "Where, however, a *statute* merely prescribes the duties of the officer, as that he shall safely keep money or property received or collected, and shall pay it over when called upon to do so by the proper authority, it can not, without more, be regarded as enlarging or in any way affecting the degree of his responsibility." (Page 345.)

It will be observed that the court is speaking of a statute, not of a bond. All decisions, including that of *United States* v. *Thomas*, concur, as has been shown, that the bond of an official, as was said by Mr. Justice

Bradley in the Thomas case, "enlarges the implied obligation of the receiving officer and deprives him of defenses which are available to an ordinary bailee."

This view of the Thomas case was recently sustained by the circuit court of appeals in the Bosbyshell case, which was an action brought by the United States upon the official bond given by Oliver C. Bosbyshell as Superintendent of the United States mint in Philadelphia. Acheson, circuit judge, speaking for the court, said:

> But it is contended that the language of the statute simply declares the common-law duty of a bailee to keep in a safe manner, and that the absence of an express contract to deliver relieves the defendants from the stringent rule of responsibility enforced in the cited cases. We think, however, that the words of the statute, "safely keep until legally withdrawn," clearly import an obligation to deliver to the Government or according to its orders, and that such a liability must be read into the condition of the bond. But even if the condition of the bond to "safely keep" is to be understood in the strictest sense of the language used, still, upon the principle of the adjudged cases referred to, the obligors would be answerable for a loss by larceny, although without fault or negligence on the part of the official, because the obligation to keep safely is without any qualification or exception. The case of *United States* v. *Thomas*, 15 Wall., 337, does not, we think, help the plaintiffs in error; *for the only point there determined was that the*

forcible seizure of public property by the public enemy, without fault or neglect of the officer in charge, excused compliance with the condition of his official bond. That case, it seems to us, does not weaken the authority of the previous decisions of the Supreme Court upon the particular question now before us. (*Bosbyshell* v. *United States*, C. C. A., 77 F. R., 944, affirming 73 F. R., 616.)

In the case at bar, therefore, the *statute* which requires the superintendent of a mint to "keep safely until legally withdrawn" may not enlarge the common-law duty, but the *bond* of Dr. Smyth, by which he expressly obligated himself to "keep safely until legally withdrawn," "enlarges the implied obligation of the receiving officer and deprives him of defenses which are available to an ordinary bailee."

The other distinction in the Thomas case does not affect the pending question, viz, that there is a difference "between an absolute agreement to do a thing and a condition to do the same thing inserted in the bond." Under a well-known principle of law, default in a condition is excused by two causes, viz, the act of God or a public enemy, and all that the Thomas case decides is that the seizure of property by a public enemy in a state of war will excuse the receiving officer.

Mr. Justice Miller dissented in *United States* v. *Thomas*, and did so partly for the reason that an act of Congress had been already passed, affording relief in such cases through the Court of Claims. As this act was passed in view of the prior decisions of the court, it is inter-

esting to refer to it as showing the interpretation which Congress had placed upon them.

> That the Court of Claims shall have jurisdiction to hear and determine the claim of any paymaster, quartermaster, commissary of subsistence, or other disbursing officer of the United States, or of his administrators or executors, for relief from responsibility on account of losses by capture or otherwise, while in the line of his duty, of Government funds, vouchers, records, and papers in his charge, and for which such officer was and is held responsible: *Provided*, That an appeal may be taken to the Supreme Court as in other cases. (Act of May 9, 1866.)

It is interesting to note that the supreme courts of two Western States have already noticed *United States* v. *Thomas*. In *State* v. *Moore*, 74 Mo., 413 (1881), and *State* v. *Nevada*, 19 Nevada, 162 (1885), the defendants appealed to *United States* v. *Thomas* as sanctioning the doctrine that the liability in such cases was that merely of a common-law bailee. The judges, however, pointed out that the case only exemplifies a well-defined exception to the general rule, and that it only goes so far as to decide that in such cases the defense of "public enemy" is sufficient to relieve from liability.

Outside of the Federal courts there are many decisions confirming the Government's contention. The courts of Pennsylvania, Massachusetts, New Jersey, Ohio, Indiana, Missouri, and several Western States are a unit on the question. See *Commonwealth* v. *Comly* (3

Barr (Pa.), 372); *Inhabitants* v. *Hazard* (12 Cushing (Mass.), 112); *Inhabitants* v. *McEachron* (33 N. J. L., 339); *State* v. *Harper* (6 Ohio, 607); *Halbert* v. *State* (22 Ind., 125); *State* v. *Jackson Township* (28 Ind., 86); *Ross* v. *Hatch* (5 Iowa, 149); *Taylor* v. *Morton* (37 Iowa, 551).

State decisions might be multiplied, but we trust that enough have been cited to show that the vast majority have been in accordance with the Federal cases. The results reached in the decisions may be summarized as follows:

1. That the execution of a bond in such cases superimposes upon the implied contract of bailment an express contract, which carries with it a greater liability. As was said by Judge Strong, in *United States* v. *Bevans*, "There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. (*United States* v. *Bevans*, 13 Wall., 56.)

2. That a bond conditioned for the *safe-keeping* of money is not discharged upon proof that the money had been burned or destroyed while in the hands of the obligor without his fault or negligence.

While it is true that in many of the cases the words *and pay over* were added in the bond, the necessity of such a clause has never been admitted in this country. No United States cases have rested on such strained and technical distinction. The case at bar, however, could not in any event be made to rest on this distinction, for the additional words, "*Until legally withdrawn*," are a portion of the bond.

3. Apart from the execution of a particular bond, *public policy* demands that receivers of public moneys and property be held to a stricter accountability than that required of ordinary bailees at common law.

4. Only two defenses have in such cases been held by the United States Supreme Court to be sufficient to discharge from liability. These defenses are, "the act of God," and "the act of a public enemy." Even robbery is not regarded as sufficient. The latter defense existed in *Boyden* v. *United States* (13 Wall., 17); *Inhabitants* v. *McEachron* (33 N. J. L., 339); *State* v. *Harper* (6 Ohio St., 607), and *Halbert* v. *State* (22 Ind., 125).

THE BOND IN THE CASE AT BAR.

The condition of Dr. Smyth's bond is as follows:

> Now, therefore, if the said Andrew W. Smyth shall faithfully and diligently perform, execute, and discharge, all and singular, the duties of the said office, according to the laws of the United States, then this obligation to be void and of no effect; otherwise, etc.

This, of course, reads into the bond the various laws of the United States prescribing the duties of the superintendent of a mint, and also the various regulations of the Mint Bureau relating to his office.

These laws and regulations may be classified as follows:

(1) The general description of the office—the control of the mint under the charge of the superintendent and the supervision of the officers and persons employed therein.

(2) His duty to render faithful reports, accounts, and statements to the Director of the Mint Bureau.

(3) His duty *to keep safely until legally withdrawn* all bullion and moneys in his custody.

(4) His duty "at the close of each annual settlement" to have a "full and accurate count and weighing of the moneys and bullion" in his possession as superintendent.

(1) Section 3503 of the Revised Statutes provides as follows:

> The superintendent of each mint shall have control thereof, the superintendence of the officers and persons employed therein, and the supervision of the business thereof, subject to the approval of the Director of the Mint. * * *

Section 8, Article XXIX, Regulations of the Mint Bureau, prescribes as follows:

> The superintendent or assayer in charge *shall devise such mode of securing the safety of the moneys, bullion, and property, and the premises of the building of which he has charge, as he may deem necessary;* and to this end he shall see that the watchmen, messengers, doorkeepers, etc., have prescribed rounds of patrol, and that a proper and careful examination is made daily to make sure that the fastenings are secure, the fires safe, and no one concealed in the building.

(2) Section 3503, Revised Statutes, provides—

> * * * He (that is, the superintendent) shall make reports to the Director of the Mint at such times and according to such forms as the Director may prescribe, which shall exhibit

in detail, and under appropriate heads, the deposits of bullion, the amount of gold, silver, and minor coinage, and the amount of unparted, standard, and refined bars issued, and such other statistics and information as may be required.

Article 30 of the Regulations provides for monthly reports of the deposits of gold and silver, quarterly coin and bullion accounts, and an annual statement of the work, etc., of the mint during the preceding year.

(3) Section 3506, Revised Statutes, prescribes as follows:

> THE SUPERINTENDENT OF EACH MINT SHALL RECEIVE AND SAFELY KEEP, UNTIL LEGALLY WITHDRAWN, ALL MONEYS AND BULLION WHICH SHALL BE FOR THE USE OR EXPENSES OF THE MINT. HE SHALL RECEIVE ALL BULLION BROUGHT TO THE MINT FOR ASSAY OR COINAGE. HE SHALL BE THE KEEPER OF ALL BULLION OR COIN IN THE MINT, EXCEPT WHILE THE SAME IS IN THE HANDS OF OTHER OFFICERS. * * *

These duties are explicit and sufficiently precise, and the defendants agreed that they would hold themselves liable if these duties were not faithfully discharged. Surely the court will not say that the many cases we have cited are inapplicable because the bond does not expressly provide for "payment over." Surely the words, "until legally withdrawn," must be regarded as equivalent. Any other construction of these words would partake of the nature of a legal quibble.

Did he "safely keep until legally withdrawn" this money?

Admittedly, when it was sought to legally withdraw it the money was gone, and had not been "safely kept." The breach of the bond is therefore indisputable.

(4) Section 4 of article 18 of the Regulations provides—

> That at the close of the annual settlement, and that at any other time the Director may require, there shall be a full and accurate count and weighing of the moneys and bullion in the possession of the superintendents of the mints * * * for the purpose of ascertaining whether the officer in charge has in his possession the amount of public moneys with which he stands charged by the Treasury Department.

Before leaving the discussion of the wording of the bond, the attention of the court is called to a provision in the Revised Statutes, which, it would appear, was intended by Congress to cover the very case in hand.

Section 3501, Revised Statutes, after prescribing that the superintendent, the assayer, the melter and refiner, and the coiner of each mint shall give bonds for the faithful and dilligent performance of their duties, provides as follows:

> Similar bonds may be required of the assistants and clerks, in such sums as the superintendent shall determine, with the approbation of the Director of the Mint; *but the same shall not be construed to relieve the superintendent or other officers from liability to the United States for acts, omissions, or negligence of their subordinates or employees;* and the Secretary of the Treasury may, at his discretion, increase the bonds of the superintendents.

The provision which we have underscored clearly contemplates such a loss as that which led to the institution of this suit. The words of the section imply a liability arising, not through the negligence of the superintendent, but through *his having unconditionally undertaken the discharge and execution of certain specific duties.* The case which Congress had in mind was in express words that of a loss arising through the act (as theft), omission, or negligence of an employee.

It is further noticeable that the superintendent is made liable for the *omissions* as well as the *negligence* of an employee, the law expressly declaring that the giving of bonds by employees shall not relieve the superintendent from liability for *acts and omissions*, as well as *negligence* of those employees.

This was clearly seen and stated by Judge Gibson, in *Commonwealth* v. *Conly.* In that case he declared:

> *A chancellor is not bound to control the legal effect of a contract in any case; and his discretion, were he at liberty to use it, would be influenced by considerations of general policy.*

He had already said:

> *The keepers of the public moneys, or their sponsors, are to be held strictly to the contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant.* (*Commonwealth* v. *Conly*, 3 Barr., 372.)

II.

THE PLEA *NON EST DAMNIFICATUS* DOES NOT AVAIL AGAINST AN OBLIGATION TO DO SPECIFIC THINGS.

Plaintiffs in error contend "that the entire débris of this burnt money was delivered by Smyth to the authorized representatives of the Government," and that "the Government has not suffered any substantial damages by the destruction of its own obligations." (Plaintiffs' brief, pp. 12 and 13.)

This burnt money was turned over to Dr. Barrett and Mrs. Rosenberg, the Government experts, for examination and investigation. (Rec., p. 32.) It has since been kept in the vault by the successors of Dr. Smyth, but has never been accepted by the Treasury Department. Plaintiffs in error properly characterize it as "débris," for it is no longer money, but charred paper.

The condition of Dr. Smyth's bond is that he "shall faithfully and diligently perform, execute, and discharge all and singular the duties of said office according to the laws of the United States."

> A bond conditioned for the performance of the duties of a public office generally is construed so as to embrace all the duties which by law are required of the officer and such other duties as are reasonably incident or necessary to be performed in order to give proper effect to the duties prescribed. (Am. and Eng. Ency. of Law, 2d ed., vol. 4, p. 681, and authorities cited in note 2.)

It is the duty of the Superintendent to "receive and *safely keep* until legally withdrawn all moneys or

bullion which shall be for the use or the expenses of the Mint." (R. S., sec. 3506.)

> Where the condition of a bond is merely to indemnify, the plea of *non damnificatus* is a good plea; but where a bond is not one to indemnify against damage, but an affirmative agreement to do a specific thing, liability must be adjudged, notwithstanding no loss results from the nonperformance, and *non damnificatus* or no damage is not a good plea. (Ency. of Pleading and Prac., vol. 3, p. 663, and authorities cited in Note 1.)
>
> The importance of determining whether a condition is one of indemnity or not is, practically, very great. (Am. and Eng. Ency. of Law, 2d ed, vol. 4, p. 694, and authorities cited in Note 1, on p. 695.)
>
> In an action of debt on a bond, when the condition stipulates for the performance of any particular act, the plea of *non damnificatus* is insufficient. (Am. Digest, vol. 8, p. 274, and authorities cited in paragraph 183.)

In *Hicks* v. *Hoos* (44 Mo. App., 579) the court, by Ellison, J., said:

> Though it may be said that the object in executing the bond was most probably to add to the security and thereby save the plaintiff from loss of any portion of his loan, yet the covenant is specific, and liability must be adjudged notwithstanding no loss is shown to have yet resulted from nonperformance. In such bonds *non damnificatus* is not a good plea. The distinction between indemnity against loss or

damage and a specific covenant to perform a definite thing is clearly made.

"Surely an obligation to safely keep $25,000 of the public moneys, which obligation clearly implies a safe delivery of it, can not be satisfied by the turning over to the Government of a box full of ashes claimed to be the remnants of the moneys, and if it were the law that such an issue must be submitted to a jury, an easy way may be contrived to escape the strict accountability to which all the Federal authorities hold custodians of public moneys.

As Mr. Justice McLean said in *United States* v. *Prescott* (*supra*):

> Public policy requires that every depositary of public moneys should be held to a strict accountability. Not only that he should exercise the highest degree of vigilance, but that *he should safely keep* [italics of the court] the moneys which come to his hands. Any relaxation of this condition would open a door to frauds, which might be practiced with impunity. A depositary would have nothing more to do than to lay his plans and arrange his proofs so as to establish his loss without laches on his part.

So, as to the contention here made, if a custodian of public moneys may in lieu of the moneys produce ashes and assert that the moneys were United States Treasury notes and were burnt, and this should be a legal defense, then in practice it would almost always prevail, because in the nature of the matter it would

in nearly all cases be impossible for the Government to overcome the testimony of the officer. In this cause Dr. Smyth is estopped from raising the question whether the United States are damnified when United States Treasury notes are destroyed by fire. To hold him, it is sufficient to say that he has violated the obligation of his bond to safely keep and deliver those notes, which were unquestionably "moneys" of the United States. (Parlange, J., Rec., p. 22.)

III.

DEFENDANTS WERE NOT ENTITLED IN THIS ACTION TO A CREDIT FOR $1,182.

The contention that the trial court should have instructed the jury to give credit for the $1,182 which the Government experts testified was the aggregate amount of all the money burned is answered by the argument already advanced. The delivery of ashes or charred paper, which originally was $1,182 in currency, is not a fulfilment of the obligation of the superintendent "to safely keep until legally withdrawn" that sum.

Under section 951, Revised Statutes, "In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the Treasury and to have been disallowed in whole or in part," etc.

In this case no claim for credit or set-off was ever presented to the proper officers and disallowed. In

Yates et al. v. *United States* (90 Fed. Rep., 57), which was an action against Yates, an Indian agent, and the sureties on his official bond to recover money in Yates's hands, the circuit court of appeals, ninth circuit, in discussing Yates's claim to a credit of $117.35 for authorized traveling expenses, said:

> There is no competent evidence in the record that any voucher was presented to the accounting officers, as requested by the letter of the Commissioner. All presumptions are in favor of the judgment. In order to secure a reversal or modification of the judgment, the plaintiffs in error must affirmatively show that the item of $117.35 was disallowed, in whole or in part. This they have failed to do. The proper evidence to show that a claim has been disallowed by the accounting officer is by the transcript from the books of the Treasury. No particular form is essential to the allowance or disallowance of a claim, but a mere suspension of action is not a disallowance.

See also *United States* v. *Fletcher* (147 U. S., 664).

Attention is here directed to certain testimony of H. C. Steirs, a representative of the Treasury Department and the first witness for the Government.

> Q. Now, look at that whole account of Dr. Smythe, and see if there is any mention made there, and if there is, point it out to us, of any shortage or deficit of $25,000.
>
> A. There is not. There is a balance here in what is termed the Treasury note account, admitted by Dr. Smythe, of $428,520.59, admitted as due to the United States by Dr. Smythe.

Q. You counted that money?

A. Yes, sir.

Q. That is the last account Dr. Smythe made to the Government?

A. Well, that is the balance on the 30th of June; that is the count made here, that goes up to the date of the transfer; but there are no differences in the balances; the balances are the same.

Q. That is his last fiscal year account?

A. Yes, sir.

Q. And it was not until you counted, according to this document, page 1, that you found the actual deficit of $25,000?

A. I counted this Treasury note account to find the balance there, as I had previously found in the other account here, and instead of $428,520.59 I found it only $403,520.59; Dr. Smythe, in all of his accounts, admitting $428,520.59 as the balance due from him to the United States.

Q. And in the subsequent account also?

A. In all the accounts of Dr. Smythe.

Q. Turn to that account and mark it with a letter.

A. Yes, sir; it agrees absolutely with this statement—the Treasury Department statement. This is the account of July 24, 1892, the date of the transfer.

Q. That is when he went out of office?

A. Yes, sir; the account is up to July 24, 1893, the time when he went out of office and Mr. Cade took possession.

Q. Does he include the $25,000 in the account of Treasury notes?

A. Certainly.

Q. He never has excluded it?

A. No, sir; never—always $428,520.59, as due the United States by him.

Q. And you never ascertained the deficit until you counted?

A. No, sir; I counted $428,520.59, and found $403,520.59.

Q. Then the last report made by Mr. Smythe to the United States was the report in which he included in his Treasury note account this $25,000 as due the Government?

A. Yes, sir; I was going to say that that agrees absolutely with the Treasury Department.

Q. Does it not agree with Dr. Smythe's account?

A. Certainly; Dr. Smythe never changes his statement that he is responsible to the United States for $428,520.59. That includes the deficit. The Treasury Department makes up a statement, which agrees with Dr. Smythe's, that he owes $428,520.59, and therefore when we gave Dr. Smythe credit for the amount transferred to Overton Cade, we still held Dr. Smythe as owing the Government $25,000, in accordance with his own statements, and it so stands on the books of the Treasury Department to-day.

(Record, p. 30.)

A further answer to the contention of plaintiffs in error is that under the regulation and practice of the Treasury Department, only bills the complete fragments of which can be put together will be redeemed

and new notes issued therefor. Incomplete fragments will not be redeemed, and the fact that no evidence was offered that Dr. Smyth had ever sought to have this charred "débris" redeemed justifies the presumption that its condition was such that it was not redeemable. The fact that the Government experts, after a very critical examination, were able to say that the "débris" represented $1,182, without more, did not entitle Dr. Smyth to have new bills issued for that amount.

IV.

INTEREST SHOULD BE COMPUTED FROM THE TIME DR. SMYTH RECEIVED THE MONEY.

Under section 3624, Revised Statutes, "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due the United States, upon the adjustment of his accounts, * * * an interest of six per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury," shall be collected on such judgments.

Plaintiffs in error rely upon the act of August 8, 1888 (25 Stat., chap. 787, p. 387), which provides in effect that sureties on bonds shall be notified whenever any deficiency shall be discovered, "but a failure to give or mail such notice shall not discharge the surety or sureties upon such bond."

The sureties on this bond were notified, but not immediately. The fact that interest in such cases is to be computed from the time the principal receives the

money, which, in fact, may be months or even years prior to the discovery of a deficiency, is a sufficient answer to the contention of plaintiffs in error that interest is recoverable from sureties only from date of notice.

V.

The contention of the plaintiffs in error that the judgment rendered against W. H. Byrnes, administrator of the succession of Edward Conery, deceased, *in solido* with the other defendants, should have been rendered against said administrator, payable only in due course of administration, is purely technical and without merit. Under section 3467, Revised Statutes, it is provided that—

> Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid.
>
> Under the acts of Congress, which control all State laws for the distribution of estates, debts due to the United States take precedence of all other debts of the decedent. (1 Ed. Am. Enc. of Law, vol. 5, pp. 248, 249; note 3, and authorities there cited. *Ibid.*, vol. 2, p. 466):
>
> Debts due the United States are entitled to priority of payment by the estate of a deceased debtor. (R. S., 3466, 3468. Notes 9–10.)

As this judgment would take precedence of all other debts of the decedent, it in fact makes no difference whether the judgment is payable in due course of administration or otherwise. Moreover, assuming the correctness of the contention that this executory judgment against plaintiff in error Byrnes should be payable only in due course of administration, we submit that the judgment would be thus interpreted. The record fully discloses Byrnes's status in this proceeding, and the words "in due course of administration" would, if necessary, be supplied.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

CHAS. H. ROBB,
Of Counsel.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1902.

ANDREW W. SMYTH ET AL., PLAINTIFFS IN error,
v.
THE UNITED STATES.
No. 88.

SUPPLEMENTAL STATEMENT FOR UNITED STATES.

I desire to correct a misstatement contained in my brief (pp. 37 and 38) as to the exchangeability of mutilated currency for new currency. The rules and regulations of the Treasury Department governing such exchanges are as follows:

> 12. United States notes, Treasury notes of 1890, fractional-currency notes, gold certificates, silver certificates, and national-bank notes, when mutilated so that less than three-fifths, but clearly more than two-fifths, of the original proportions remain, are redeemable by the Treasurer only, at one-half the face value of the whole note or certificate. Fragments not clearly more than two-fifths are not redeemed, unless accompanied by the evidence required in paragraph 13.
>
> 13. Fragments less than three-fifths are redeemed at the face value of the whole note when

> accompanied by an affidavit of the owner or other persons having knowledge of the facts that the missing portions have been totally destroyed. The affidavit must state the cause and manner of the mutilation, and must be sworn and subscribed to before an officer qualified to administer oaths, who must affix his official seal thereto, and the character of the affiant must be certified to be good by such officer or some one having an official seal. Signatures by mark (X) must be witnessed by two persons who can write, and who must give their places of residence. The Treasurer will exercise such discretion under this regulation as may seem to him needful to protect the United States from fraud. Fragments not redeemable are rejected and returned. Paper currency which has been totally destroyed can not be redeemed. The Department does not furnish blank forms for affidavits. (1900, Department Circular No. 32; Treasurer's Office No. 69.)

There is nothing in the evidence to show whether the fragments of notes in this case were greater or less than the proportions mentioned in the above Regulations; but it is not important whether these charred fragments are exchangeable for new notes, for the record is silent as to any such claim on the part of the superintendent of the mint in the adjustment of his accounts with the Government.

It will be observed that under the Regulations exchange is to be made by the Treasurer only, and where portions of the notes are totally destroyed affidavits must be made by those having knowledge of the facts

"that the missing portions have been totally destroyed." The right to exchange is then left to the executive discretion of the Treasurer, and the exercise of such executive discretion is not reviewable by the courts. Even, therefore, if a claim had been made to the Treasurer to exchange new notes for the mutilated currency, the decision of the Treasurer would be final as to such right of exchange. In this case, however, the record fails to show that any such application was made to the Treasurer or that the necessary affidavit to support it was made. In their mutilated form they were clearly not a legal tender.

Respectfully submitted.

JAMES M. BECK,
Assistant Attorney-General.

CHAS. H. ROBB,
Of Counsel.

O

Supreme Court of the United States.

No. 88.—October Term, 1902.

Andrew W. Smythe, William H. Byrnes, Administrator of the Succession of Edward Conery, deceased, et al., Plaintiffs in Error,
vs.
The United States.

In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 26th 1903.]

Mr. Justice Harlan delivered the opinion of the Court.

This was an action upon the official bond of Andrew W. Smythe as Superintendent of the Mint of the United States at New Orleans to recover the sum of twenty-five thousand dollars with six per cent interest from April 1st 1893 until paid—that being the amount found due to the United States at the date of the examination, adjustment and statement of his accounts by the proper officers of the Treasury. The sureties on the bond were Edward Conery and David Chambers McCan.

The bond was conditioned that the Superintendent should "faithfully and dilligently perform, execute and discharge all and singular the duties of said office according to the laws of the United States, then this obligation to be void and of no effect, otherwise to remain in full force and value."

When this bond was executed it was provided by section 3500 that every officer of the Mint, before entering upon the duties of his office, should take an oath faithfully and diligently to perform the duties thereof; by section 3501, that the Superintendent, before entering upon his office, should become bound to the United States, with one or more sureties, in a named sum, "with the condition for the faithful and diligent performance of the duties of his office;" by section 3503, that the Superintendent of each Mint "shall have the control thereof, the superintendence of the officers and persons employed therein, and the supervision of the business thereof, subject to the approval of the Director of the Mint;" by section 3504, that "he shall keep and render quarter-yearly to the Director of the Mint, for the purpose of adjustment according to such forms as may be prescribed by the Secretary of the Treasury, regular and faithful accounts of the transactions with the other officers of the Mint and the depositors;" and by section 3506, that "the Superintendent of each Mint shall receive and safely keep, until legally withdrawn, all moneys or bullion which shall be for the use or expenses of the Mint."

It appeared in the evidence that the defendant Smythe, as Superintendent of the Mint, received various sums of money in United States Treasury notes, and that upon a statement of his accounts by the proper officers of the Treasury there was a deficit of $25,000.

The defense was that the $25,000 of Treasury notes was placed by the Superintendent in a tin box in the steel vault provided by the Government for the safekeeping of public funds in his custody, and that the notes while in that box were charred, burnt and destroyed by fire that occurred in the vault, without any negligence on the part of the Superintendent, or his agents or employes.

The Government insisted at the trial that even if the Treasury notes were destroyed, in the manner and to the amount claimed, without negligence on the part of the Superintendent, nevertheless, he was liable on his bond—its contention being that he was under the obligations, practically, of an insurer in respect of all public funds coming to his hands, and could not be relieved, unless the loss occurred by the act of God or the public enemy. This view was approved by the Circuit Court, which, at the conclusion of the evidence, directed a verdict against the defendants, and judgment was accordingly rendered for the full amount claimed by the United States. The court added the following words to its memorandum of reasons for that direction: "In this cause there has been no charge or intimation that Dr. Smythe was personally at fault or blamable in any way. Such fault or negligence as may have been shown in the cause is attributable to his subordinates and in no manner to him."

The Circuit Court of Appeals approved the view taken by the Circuit Court, and affirmed the judgment. The opinion of the former court is reported in 107 *Fed. Rep.* 376.

As the Circuit Court and the Circuit Court of Appeals both held that the question of the liability of Smythe was determined for the Government by the decisions of this court—which view the defendants controverted—we must ascertain the import of those decisions. This course is made necessary by the contention of the defendants that the latest decision of this court, to which reference will be presently made, modified the earlier decisions upon which the Government relies.

The first case is that of *United States* v. *Prescott*, 3 *How.* 578, 587. That was an action on the bond of a receiver of public moneys, conditioned for the faithful performance of his duties, and that he "should well, truly and faithfully keep, safely, without loaning or using, all the public money collected by him, or otherwise at any time placed in his possession and custody till the same had been, or should be ordered by the proper department or officer of the Government, to be transferred or paid out," &c.

The defense was that the money for the non-payment of which the United States sued had been feloniously stolen, taken and carried away from his possession by some unknown person or persons without fault or negligence on his part, and notwithstanding he had used ordinary care and diligence in keeping it. The receiver contended that he was liable only as a depositary for hire, unless his liability was enlarged by the special contract to keep safely, which he insisted was not the case.

The court said: "This is not a case of bailment, and consequently the law of bailment does not apply to it. The liability of the defendant Prescott arises out of his official bond and principles which are founded upon public policy." Again: "The condition of the bond has been broken, as the defendant Prescott failed to pay over the money received by him when required to do so; and the question is whether he shall be exonerated from the condition of his bond on the ground that the money has been stolen from him. The objection to this defense is that it is not within the the condition of the bond, and this would seem to be conclusive. The contract was entered into on his part, and there is no allegation of failure on the part of the Government. How then can Prescott be discharged from his bond? He knew the extent of his obligation when he entered into it, and he has realized the fruits of this obligation by the enjoyment of the office. Shall he be discharged from liability, contrary to his own express undertaking? There is no principle on which such a defense can be sustained. The obligation to keep safely the public money is absolute, without any condition, express or implied, and nothing but the payment of it when required can discharge the bond." . . "Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that 'he should keep safely' the moneys which come to hands. Any relaxation of this condition would open the door to frauds, which might be practiced with impunity. A depositary would have nothing to do than to lay his plans and arrange his proofs, so as to establish his loss, without laches on his part. Let such a principle be applied to our postmasters, collectors of the customs, receivers of public moneys, and others, who receive more or less of the public funds, and what losses might not be anticipated by the public. No such principle has been recognized or admitted as a legal defense. . . As every depositary receives the office with a full knowledge of its responsibilities, he cannot, in case of loss, complain of hardship. He must stand by his bond, and meet the hazards which he voluntarily incurs."

The next case is that of *United States* v. *Morgan*, 11 *How.* 154, 158. That was an action upon the bond of a collector of customs, conditioned that he "has truly and faithfully executed and discharged, and shall continue truly and faithfully to execute and discharge, all the duties of the

said office." The condition was alleged to have been broken in that the collector had not paid over large sums of money collected for the United States, and by not making seasonable returns of his accounts.

The court characterized as an erroneous impression that the collector "was acting as a bailee, and under the responsibilities of only the ordinary diligence of a depositary as to the cancelled notes, when in truth he was acting under his commission and duties by law, as collector, and under the conditions of his bond. The collector is no more to be treated as a bailee in this case than he would be if the notes were still considered for all purposes as money. He did not receive them as a bailee, but as a collecting officer. He is liable for them on his bond, and not on any original bailment or lending. And if the case can be likened to any species of bailment in forwarding them, by which they were lost, it is that of a common carrier to transmit them to the Treasury, and in doing which he is not exonerated by ordinary diligence, but must answer for losses by larceny and even robbery. 2 *Salk.* 919; 8 *Johns.* 213; *Angell on Carriers*, §§ 1, 9."

In *United States* v. *Dashiel*, 4 *Wall.* 182—which was an action on the bond of a paymaster in the army for not paying over or accounting for public money that came into his hands—the defense was that without any want of proper care and vigilance on the part of the paymaster a certain part of the moneys had been stolen from him. The trial court held that the theft or robbery, if satisfactorily proved, was a good defense. But this court held otherwise upon the authority of *United States* v. *Prescott* and *United States* v. *Morgan*, *above cited*, and reversed the judgment.

Substantially the same question arose in *United States* v. *Keehler*, 9 *Wall.* 83, which was an action upon a bond of a postmaster in North Carolina. The bond was conditioned, among other things, that the obligor would well and truly discharge the duties of postmaster, and keep safely, without lending, using, depositing in banks, or exchanging for other funds, than as allowed by law, all the public money at any time in his custody, till the same was ordered by the Postmaster General to be transferred or paid out. In the spring of 1861, after the civil war commenced, the postmaster was still in office, and had in his hands $330 of post-office money belonging to the United States. At that time the United States was indebted to one Clemmens, a mail contractor in that region, for postal service, in a sum exceeding $300. In August 1861 the Confederate Congress passed an act appropriating the balances in the hands of such postmasters of the United States as at the commencement of the war resided within the limits of the Confederate States, to the *pro rata* payment of claims against the United States for postal service. The postmaster paid the $330 in his hands to Clemmens—relying upon the above act of the Confederate Congress and an official order from the Confederate

Post Office Department directing him to make such payment. It was admitted in the case that throughout the year 1862 the Confederate Government had force sufficient at its command to enforce its orders, and did enforce the orders of such Government, in that part of North Carolina in which Salem was situated, and "that no protection was afforded to the citizens of that part of the State by the Government of the United States during that term."

After observing that the postmaster had no right to select a creditor of the United States and pay what he might suppose the Government owed him, the court said that "the acts of the Confederate Congress would have no force at law in diverting or transferring rights, or as authority for any act opposed to the just authority of the Federal Government." Referring to the statement of facts made in the case, and which were substantially as above recited, it said: "This statement falls short of showing the application of any physical force to compel the defendant to pay the money to Clemmens. Nor is it in the least inconsistent with the fact that he might have been desirous and willing to make the payment. It shows no effort or endeavor to secure the funds in his hands to the Government, to which he owed both the money and his allegiance. Nor does it prove that he would have suffered any inconvenience, or been punished by the Confederate authorities, if he had refused to pay the draft of the insurrectionary post-office department on him. We cannot see that it makes out any such loss of money, by inevitable overpowering force, as could even on the mere principle of bailment discharge a bailee. We cannot concede that a man who, as a citizen, owes allegiance to the United States, and as an officer of the Government holds its money or property, is at liberty to turn over the latter to an insurrectionary government, which only demands it by ordinances and drafts drawn on the bailee, but which exercises no force or threat of personal violence to himself or property in the enforcement of its illegal orders." The court, reaffirming the doctrine of the Prescott, Morgan and Dashiel cases, held that in an action on the bond of an officer receiving public funds the right of the Government to recover does not rest on an implied contract of bailment, but on the express contract in the bond to pay over the funds.

In *Boyden* v. *United States*, 13 *Wall.* 17, 24, which was an action upon the bond of a receiver of public moneys—the defense being that the receiver had been by irresistible force robbed of the moneys sued for—the court said: "Were a receiver of public moneys, who has given bond for the faithful performance of his duties as required by law, a mere ordinary bailee, it might be that he would be relieved by proof that the money had been destroyed by fire or stolen from him, or taken by irresistible force. He would then be bound only to the exercise of ordinary care, even though a bailee for hire. The contract of bailment implies no more, except in the

case of common carriers, and the duty of a receiver, *virtute officii*, is to bring to the discharge of his trust that prudence, caution and attention which careful men usually bring to the conduct of their own affairs. He is to pay over the money in his hands as required by law, but he is not an insurer. He may, however, make himself an insurer by express contract, and this he does when he binds himself in a penal bond to perform the duties of his office without exception. There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel to impossibilities, but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, though unforeseen by the contracting party and not within his control, he will not be excused." Again, in the same case: "It is true that in Prescott's case the defense set up was that the money had been stolen, while the defense set up here is robbery. But that can make no difference unless it be held that the receiver is a mere bailee. If, as we have seen, his liability is to be measured by his bond, and that binds him to pay the money, then the cause which renders it impossible for him to pay is of no importance, for he has assumed the risk of it."

At the same term of the court the case of *Bevans* v. *United States*, 13 *Wall.* 56, 60, was determined. That was a suit upon a bond of excuted by by Bevans, a receiver of public moneys, in a land district of Arkansas. The court reaffirmed the rule announced in the Prescott case, and said that "it is not to be overlooked that Bevans was not an ordinary bailee of the Government. Bailee he was undoubtedly, but by his bond he had insured the safekeeping and prompt payment of the public money which came to his hands. His obligation was not less stringent than that of a common carrier, and in some respects it was greater"—citing *United States* v. *Prescott*. In the same case the court said in reference to that part of the defense attributing the loss of the money in question to the action of the Confederate power, said: "It may be a grave question whether the forcible taking of money belonging to the United States from the possession of one of the officers, or agents lawfully holding it, by a government of paramount force, which at the time was usurping the authority of the rightful government, and compelling obedience to itself exclusively throughout a State, would not work a discharge of such officers or agents, if they were entirely free from fault, though they had given bond to pay the money to the United States. This question has been thoroughly argued, but we do not propose to consider it, for its decision is not necessary to the case."

The question thus reserved from decision arose and was decided in *United States* v. *Thomas*, 15 *Wall.* 337, 341–2, 346–7, 350, 352. That was an action on the bond of a surveyor of customs at Nashville, he being also a depositary of public moneys at that city. The special defense was that

the moneys in question were seized by the Confederate authorities against the will and consent of the surveyor, and by the exercise of force which he was unable to resist, he being a loyal citizen and endeavoring faithfully to perform his duty. The court said: "This case brings up squarely the question whether the forcible seizure, by the rebel authorities, of public moneys in the hands of loyal Government agents, against their will and without their fault or negligence, is or is not a sufficient discharge from the obligations of their official bonds. The precise question has not yet been decided by this court. As the rebellion has been held to have been a public war, the question may be stated in a more general form, as follows: Is the act of a public enemy in forcibly seizing or destroying property of the Government in the hands of a public officer, against his will and without his fault, a discharge of his obligation to keep such property safely, and of his official bond, given to secure the faithful performance of that duty and to have the property forthcoming when required? . ."

"That overruling force arising from inevitable necessity, or the act of a public enemy, is a sufficient answer for the loss of public property when the question is considered in reference to an officer's obligation arising merely from his appointment, and, aside from such a bond as exists in this case, seems almost self-evident. . . These provisions [prescribing the conditions of the bonds of receivers, &c.] show that it is the manifest policy of the law to hold all collectors, receivers, and depositaries of the public money to a very strict accountability. The legislative anxiety on the subject culminates in requiring them to enter into a bond, with sufficient sureties, for the performance of their duties and in imposing criminal sanctions for the unauthorized use of the moneys. Whatever duty can be inferred from this course of legislation is justly exacted from the officers. No ordinary excuse can be allowed for the non-production of the money committed to their hands. Still they are nothing but bailees. To call them anything else, when they are expressly forbidden to touch or use the public moneys except as directed, would be an abuse of terms. But they are special bailees, subject to special obligations. It is evident that the ordinary law of bailment cannot be invoked to determine the degree of their responsibility. This is placed on a new basis. To the extent of the amount of their official bonds is fixed by special contract, and the policy of the law as to their general responsibility for amounts not covered by such bonds may be fairly presumed to be the same." Referring to the adjudged cases, the court said: "It appears from them all (except the New York case) that the official board is regarded as laying the foundation of a more stringent responsibility upon collectors and receivers of public moneys. It is referred to as a special contract by which they assume additional obligations with regard to the safekeeping and payment of those moneys and as an indication of the policy of the

law with regard to the nature of their responsibility. But, as before remarked, the decisions do not go the length of making them liable in cases of overruling necessity." The opinion concludes: "No rule of public policy requires an officer to account for moneys which have been destroyed by an overruling necessity, or taken from him by a public enemy, without any fault or neglect on his part."

We think the Government is quite correct in its conclusion that the Thomas case does not materially modify the decisions in previous cases. The general rule announced in those cases—and the question need not be discussed anew—is that the obligations of a public officer, who received public moneys under a bond condititioned that he would discharge his duties according to law, and safely keep such moneys as came to his hands, by virtue of his office, are not to be determined by the principles of the law of bailment, but by the special contract evidenced by his bond conditioned as above stated; consequently, it is no defense to a suit brought by the Government upon such a bond that the moneys, which were in the custody of the officer, had been destroyed by fire occurring without his fault or negligence. This rule, so far from being modified by the Thomas case, is reaffirmed by it, subject, however, to the exception (which, indeed, some of the prior cases had, in effect, intimated) that it was a valid defense that the failure of the officer to account for public moneys was attributable to overruling necessity or to the public enemy. The case now before us is not embraced by either exception. The result is that the special defense here made cannot, in view of former adjudications, avail the Superintendent or his sureties.

It is appropriate here to say that the rule established by this court in the Prescott case has been enforced by numerous decisions in State courts. In *Com'th* v. *Comly*, 3 *Barr* 372—which was an action on the bond of a collector of tolls, conditioned that he would "account for and pay over all moneys he may receive for tolls," and in which the defense was that the moneys sued for had been stolen from the collector—the court said: "The opinion of the court in the case of the *United States* v. *Prescott* is founded in sound policy and sound law. The responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond. The condition of it in this instance was to account for and pay over the moneys to be received; and we would look in vain for a power to relieve him from the performance of it. . . The keepers of the public moneys, or their sponsors, are to be held strictly to their contract, for if they were to be let off on shallow pretenses, delinquencies, which are fearfully frequent already, would be incessant. A chancellor is not bound to control the legal effect of a contract in any case; and his discretion, were he at liberty to use it, would be influenced by consideration of public

policy." To the same effect are *Inhabitants* v. *Hazard*, 12 *Cush.* 112; *Inhabitants* v. *McEachron*, 33 *N. J. L.* 339; *State* v. *Harper*, 6 *Ohio St.* 607; *Halbert* v. *State*, 22 *Ind.* 125; *State* v. *Jackson Township*, 28 *Ind.* 86; *Ross* v. *Hatch*, 5 *Iowa*, 149; *Taylor* v. *Maton*, 37 *Iowa*, 551.

We hold that as the accounts of the defendant Smythe showed a deficit of $25,000 in the moneys in his custody as Superintendent of the Mint, the Government was entitled to a judgment for that amount unless, as the defendants contend, they were entitled to at least a credit for $1,182, which, it is alleged, was the amount of Treasury notes not entirely destroyed by the fire, but were only charred and were taken possession of by Government agents after the fire, and found to be in condition to be identified as to amount and date of issue.

A complete answer to this suggestion is to be found in sections 951 and 957 of the Revised Statutes—reproduced from the act of March 3d 1797, 1 *Stat.* 514, *c.* 90. Those sections are as follows:

§ 3 "In suits brought by the United States against individuals, no claim for a credit shall be admitted upon trial, except such as appear to have been presented to the accounting officers of the Treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it be proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure and that he was prevented from exhibiting a claim for such credit at the Treasury by absence from the United States or by some unavoidable accident."

§ 957. "When suit is brought by the United States against any revenue officer or other person accountable for public money, who neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, it shall be the duty of the court to grant judgment at the return term, upon motion, unless the defendant, in open court, (the United States Attorney being present) makes and subscribes an oath that he is equitably entitled to credits which had been, previous to the commencement of the suit, submitted to the accounting officers of the Treasury, and rejected; specifying in the affidavit each particular claim so rejected, and that he cannot then safely come to trial. If the court, when such oath is made, subscribed, and filed, is thereupon satisfied, a continuance until the next succeeding term may be granted. Such continuance may also be granted when the suit is brought upon a bond or other sealed instrument, and the defendant pleads *non est factum*, or makes a motion to the court, verifying such plea or motion by his oath, and the court thereupon requires the production of the original bond, contract or other paper certified in the affidavit. And no continuance shall be granted except as herein provided."

The defendants do not appear to have submitted to the accounting officers of the Treasury any request or claim for a credit for the $1,182, and no such claim could be made for the first time at the trial. Before it could have been made there should have been affirmative proof by the defendants that it was presented to the proper accounting officer, and rejected, unless, indeed, such facts had appeared from the exemplified accounts produced and relied upon by the Government. If such claim had been presented to the proper officers before suit and been disallowed it would still have been open to the defendants at the trial to insist upon its being recognized and allowed. These conclusions are unavoidable in view of the former decisions of this court. *United States* v. *Giles*, 9 *Cr.* 212, 316; *Thelusson* v. *Smith*, 2 *Wh.* 396; *United States* v. *Wilkins*, 6 *Wh.* 135, 143; *Walton* v. *United States*, 9 *Wh.* 651; *Cox* v. *United States*, 6 *Pet.* 202; *United States* v. *Reply*, 7 *Pet.* 25; *United States* v. *Fillebrown*, 7 *Pet.* 48; *United States* v. *Robeson*, 9 *Pet.* 319; *United States* v. *Hawkins*, 10 *Pet.* 125; *United States* v. *Lamb*, 12 *Pet.* 1; *United States* v. *Bank of Metropolis*, 15 *Pet.* 377; *Gratiot* v. *United States*, 4 *How.* 112; *United States* v. *Buchanan*, 8 *How.* 105; *DeGroot* v. *United States*, 5 *Wall.* 431; *United States* v. *Eckford*, 6 *Wall.* 484; *United States* v. *Gilmore*, 7 *Wall.* 491; *Halliborton* v. *United States*, 13 *Wall.* 63.

It is said, however, that the Government has not suffered any substantial damage by the destruction of its own obligations, and that in no event is it entitled to a judgment for more than nominal damages, or at most for only such amount in damages as would meet the cost of reprinting new Treasury notes to take the place of those destroyed by fire. If this view be sound, a public officer, receiving United States Treasury notes for the Government, under a bond to safely keep them and pay them over to the United States whenever required by law or ordered to do so, could deliberately destroy or burn them, and, then admitting that he had done so, could prevent any judgment against him, except one that would cover merely the cost and trouble of printing new notes. Such a proposition cannot be entertained for a moment. The plea of *non damnificatus* has no place in such a case as this. The Treasury notes that came to the hands of Superintendent Smythe was money belonging to the United States and could be used, at its pleasure, in the business of the Government. By their destruction, if they were destroyed by fire in the manner claimed, the United States was deprived of so much money, and the condition of the officer's bond that he would safely keep the moneys in his custody and turn them over to the Government, when required, cannot be met by the suggestion that the Government, if it so elects, can replace the notes destroyed by other notes and thus make itself whole, less the cost of printing new notes. It is for the Government, guided by the legislation of Congress, to determine when it shall or may issue new Treasury notes, and it cannot be

compelled to issue them in order to reimburse itself for the loss of those in the hands of an officer who was required, by the terms of his bond, to deliver them to the Treasury, but did not do so. The Government can stand upon the terms of its special contract with the Superintendent, and insist that he has not discharged his duties by safely keeping the moneys that came to his hands, and which he undertook to pay over, when required. It is sufficient in this case to say that the loss of the notes here in question cannot be attributed to overruling necessity or to any public enemy, and as they came to the hands of Superintendent Smythe, and as he did not keep the condition of his bond, the Government can look for reimbursement to that bond.

This view, it is contended, is not consistent with what was said in *United States* v. *Morgan*, above cited. It appeared in evidence in that case that the collector received nearly $100,000 for duties in Treasury notes, and cancelled them. The notes were then put up in a bundle to be sent to the Treasury Department, through the post office, and orders were given to the servant accustomed to deliver packages there to deliver those. But the bundle was stolen or lost. It appeared, also, that two of the notes for $500 each were altered and soon afterwards presented to the collector in payment of other duties, and were received by him as genuine. The court, in that case, as already shown, reaffirmed the principle announced in *United States* v. *Prescott*. After observing that the duty of the collector was to return the cancelled notes to the Treasury Department, and that he was technically liable for not having done so, the court said: "The rule of damages would be the amount of the notes, unless it appeared, as here, that they had been cancelled, and unless it was shown that the Government had suffered, or was likely to suffer, damage less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial. Only that amount rather than the whole bond need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. And if any equities exist to relieve him from that, none of which are seen by us, it must be done by Congress and not the courts of law. Anything less than this—any less strict rule, in the public administration of the finances—would leave everything loose or unsettled, and cause infinite embarrassments in the accounting offices, and numerous losses to the Government. . . Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting them in the post office so as to be returned. 5 *Stat. at Large*, 203. But how much this damage

was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the Department that the notes had been redeemed, or from any other direct consequence of the breach of the condition of his bond and of his instructions under it." The court had previously said, in its opinion: "We doubt whether, under all the circumstances, after cancelled, they [the Treasury notes] can be regarded as money or money's worth, for the purpose of sustaining this action, yet it is clear that they still possess some value as vouchers, and as evidence for the Treasury Department that they have been redeemed. It is still clear, also, that although cancelled, the Treasury Department, unless having possession of them, is exposed to expense and loss by their being altered, and the cancellation removed or extracted, and their getting again into circulation, as two did here, and being twice paid by the Government."

The injury that might probably have come to the Government by reason of the neglect of the collector in the Morgan case was such that the court could not, as in the present case, give any peremptory instruction to the jury. It could not have said, in the former case, that cancelled Treasury notes were to be regarded as money, or that the Government was entitled to judgment for the face amount of those notes, prior to their being cancelled. Nor could it say, as matter of law, that the Government was, in fact, damaged by not having the cancelled Treasury notes as vouchers. Such being the case, it was held that it was for the jury, under such evidence as might be adduced, to say what actual injury, if any, accrued to the United States by reason of the non-delivery of the cancelled Treasury notes.

The present case cannot be controlled by the rule laid down in the Morgan case. Here the Treasury notes received by Smythe were not cancelled and could be used as money. They were not safely kept nor were they destroyed through overruling neccessity or by the public enemy. Hence, there was a breach of his bond, and as the amount of the Treasury notes which he failed to deliver to the Government was clearly shown, there was nothing in this case to refer to the jury. There was no question of damage to be ascertained by a jury; for if under the circumstances disclosed the defendants were liable at all, the Government, as matter of law, was entitled to a judgment for the full amount shown to have been received by the Superintendent and not paid over by him, as required by his bond.

It remains to consider some minor objections to the judgment. It is contended that it was error to give interest on the amount of the judgment from April 1st 1893, the date from which the accounts of the Superintendent were stated at the Treasury Department.

The alleged fire occurred June 24th 1893, and on February 9th 1894 notice of the deficiency in the Superintendent's account was given to his sureties, as required by the act of August 8th 1888, 25 *Stat.* 387, c. 787. And this action was brought August 7th 1894. Interest, it is insisted, was recoverable at most only from the date of the notice to the sureties. This objection is met by section 3264 of the Revised Statutes, which provides: "Whenever any person accountable for public money neglects or refuses to pay into the Treasury the sum or balance reported to be due to the United States, upon the adjustment of his account, the First Comptroller of the Treasury shall institute suit for the recovery of the same, adding to the sum stated to be due on such account the commissions of the delinquent, which shall be forfeited in every instance where suit is commenced and judgment obtained thereon, and an interest of six per centum per annum, from the time of receiving the money until it shall be repaid into the Treasury."

This statute is mandatory, and the sureties on the bond of Superintendent Smythe must be held to have signed it in view of the requirement as to the date from which interest should be computed. It is not denied that the Treasury notes in question were received at least as early as April 1st 1893.

It is also said that it was error, under the law of Louisiana, to have rendered an absolute judgment against Byrnes, the administrator of the succession, Conery, deceased; that if any judgment was rendered it should have been against the administrator, payable only in due course of administration. This objection is quite technical. If by the law of Louisiana the judgment is so payable, it will be thus interpreted and enforced, subject, of course, to the priority given to the Government in the distribution of the proceeds of the estate of any person indebted to the United States whose estate is insufficient to pay all debts against it. *R. S. Secs.* 3466 3467.

The judgment of the Circuit Court of Appeals, affirming the judgment of the Circuit Court, is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

Supreme Court of the United States.

No. 88.—October Term, 1902.

Andrew W. Smythe, William H. Byrnes, Administrator of the Succession of Edward Conery, deceased, et al., Plaintiffs in Error,
vs.
The United States.

In error to the United States Circuit Court of Appeals for the Fifth Circuit.

[January 26, 1903.]

Mr. Justice Peckham (dissenting.)

I dissent from the conclusion arrived at in the opinion of the court, and from the judgment thereon. I agree as to the general character and extent of the liability of an officer entrusted with the care and custody of public moneys, as stated in the cases cited in the opinion upon that subject. But those cases do not touch the question involved. It is undisputed that the property, for the loss of which the defendants have been held, consisted of $25,000 of Treasury notes of the government of the United States; in other words, it consisted of the written promise of the government to pay money upon presentation of the notes. There was evidence also, at least sufficient to go to the jury, to prove that most of these notes were wholly destroyed by fire, so that there was no possibility of their being thereafter presented for payment or redemption. Treasury notes amounting to about eleven hundred dollars were not so far destroyed as to be incapable of identification or presentation for payment, and they were taken possession of and retained by the government, and yet the government also recovered judgment for their amount. Assuming the liability of the obligors in the bond to respond for all the damage sustained by the government by reason of this destruction by fire, the question is, what damage has the government suffered?

Within the case of *The United States* v. *Morgan*, (11 How. 154,) cited in the opinion of the court, that question should have been submitted to the jury under instructions that the defendant was not liable for the amount of the face of the notes in case they had been totally destroyed by the fire, but only for such cost and expense as the government might incur by reason of the replacing of the notes destroyed, including cost of paper, printing, engraving, and the trouble and inconvenience caused the government &c., together with the cost, if necessary or more convenient to the government, of the transportation of other notes to take the place of those destroyed.

This suit is upon the bond, which, as it seems to me, is plainly one of indemnity. The legal purport of such a bond is to indemnify the govern-

ment from any loss occasioned by any dereliction of the obligor. In case of a breach of the bond, the amount which the government would be entitled to recover would be measured by the loss incurred. If the loss were shown to have been the sum of five dollars or merely nominal, the plaintiff could not recover a thousand dollars, or the penalty of the bond. It is conceded in the present case that what the defendant and his sureties have been adjudged to answer for as a breach of the bond, was because $25,000 (less about eleven hundred dollars) of Treasury notes of the United States, in the custody of the superintendent, had been burnt and destroyed by fire. I concede that the bondsmen would be responsible for any loss thereby occasioned to the United States, even though without negligence on the part of the officer in whose custody the money had been placed.

In *Morgan's case* (*supra*) there was a suit by the United States against a collector of revenue. It appeared in evidence that the collector had collected about $100,000 for duties in Treasury notes, and had cancelled them. The notes were then put in a bundle and sent to the Treasury Department through the post office, but the bundle was lost or stolen. The Circuit Court gave judgment to the government in the amount of the penalty of the bond, which judgment this court reversed, and in its opinion said:

"The rule of damages would be the amount of the notes—unless it appeared, as here, that they had been cancelled, and unless it was shown that the government had suffered, or was likely to suffer, damages less than their amount. How much is the real damage, under all the circumstances, is a question of fact for the jury, and should be passed on by them at another trial. Only that amount rather than the whole bond need, in a liberal view of the law, and of his bond, be exacted; and that amount neither he nor his sureties can reasonably object to paying, when he, by the neglect of himself or his agent, has caused all the injury which he is in the end required to reimburse. . . Finally, we decide on this last question as a matter of law this, and this only, namely, that the collector is liable for all the actual damages sustained by his not returning the notes as required by law and official circulars; or for not putting them in the post office so as to be returned. (5 Stat. at Large, 208.) But how much this damage was is a matter of proof before the jury, fixing the real amount likely to happen from their getting into circulation again, as two of them did here, from delay and inconvenience in obtaining the proper vouchers to settle accounts, from the want of evidence at the department that the notes had been redeemed, or from any other direct consequence of the breach of the condition of his bond, and of his instructions under it."

The attempt made to distinguish the present case from that of *United States* v. *Morgan*, does not seem to me to be successful. Indeed the case before us presents a stronger case of a substantial defense than that of Morgan's.

To refuse this defense of a burning and total destruction of the notes leaves the strange and anomalous spectacle of a recovery by the government on account of a damage which in fact and in law it has not sus-

tained. The recovery must be upon the contract, evidenced by the bond, to safely keep and pay over, and in default to pay the damage up to the penalty of the bond. This is the contract, and that there has been a breach may be admitted at once, but the question on the part of the obligors in the bond then comes back, what damage has the government suffered by reason of the failure to keep the contract, for it is only the damage which the government in fact has sustained that we have contracted to pay. How can it be said, with the slightest reference to fact, that the damage amounts to the face of the notes when those notes are simply the promise of the government to pay upon their presentation, and the possibility of such presentation has ceased to exist?

But the right to set up and prove a defense of this character seems to be denied on some view of public policy, the propriety of which I admit I fail to recognize, and I also fail to recognize the legal power of the court to deny to the obligors the validity of a defense which shows that no damage or a less amount than claimed has been sustained, because of any assumed public policy. It is a case of contract and not of policy.

The denial of the sufficiency of the defense seemingly rests upon the ground that it is against the interests of the government, and therefore is against the public policy of the United States to permit any defense to be interposed in an action upon this kind of a bond; that no matter how clearly it may be proved that no damage has been sustained by the govment, and therefore there is nothing which the obligors have contracted to pay, still the full amount of the face of the notes must be paid to the government in order to reimburse it for a loss it has never in fact sustained. And it is proof of this very fact which is refused on the ground of public policy. Can the government maintain the proposition that if it has suffered in truth no loss it can nevertheless recover either the penalty of the bond or any less sum? This is to change the legal import of the bond. But it is nevertheless maintained that it is against public policy to permit proof of a fact which if it really existed would undoubtedly constitute a defense to the claim made by the government. That kind of a public policy which prevents a legal defense I cannot understand. I can and do appreciate a public policy that refuses to admit the sufficiency of a defense that the property was lost by or stolen from the officer without any fault on his part. The officer and his sureties have frequently endeavored to have the government bear the loss which has actually been sustained, because it happened without any fault on the part of the officer; but the courts have held that such defense is insufficient on the ground that it is against public policy to recognize it as an answer to defendant's obligation to pay over, because it would tend to diminish the care which the officer would otherwise take of the property entrusted to his custody and would lead the government into an investigation of the facts surrounding or

causing the loss, under very great disadvantages, and therefore as the loss had in fact occurred, and one or the other of the parties must bear it, the courts have said he must bear it in whose custody it had been placed by the government when it was stolen or destroyed, and the proffered answer has been held to be no defense to the contract to pay over existing in the bond, which has therefore been enforced. The courts simply decided what the contract between the parties meant, but they did not decide that a legal defense, showing there was no damage, could not be interposed.

Here, however, it seems to me plain there is no question of public policy as to what should constitute a defense. The amount of damage is what the defendants have promised to pay and nothing more. Consequently, what is damage must be shown. Now that is a question of fact, and if no damage has in fact been sustained, it is the legal right of the defendant to prove it, and it cannot, as I think, be denied him on any question of public policy. This is to me a new application of the doctrine of public policy to a strictly legal defense to the obligation contained in a contract sued upon, where both parties acknowledge the validity of such contract and the defense is founded upon the terms of the contract about whose legal meaning there cannot, as it seems to me, be any difference of opinion.

Upon the other branch of the subject, the case shows that at least $1,182 in Treasury notes were saved, although charred, and were taken possession of by the agents of the government and were identified as to the amount and date of issue. The defendants insisted there could be no recovery for this sum, as the government already had the notes in its possession, but this objection was overruled. The sections of the Revised Statutes of the United States (951, 957,) set forth in the opinion, are said to render this defense insufficient, for the reasons that the defendants had not submitted their claim for audit to the accounting officers of the Treasury. These sections are, as stated, simply reproductions of the act of 1797, which was in force when the *Morgan case*, (*supra*,) was decided, and it is not mentioned therein as an answer to the defense set up by defendants. Probably the provision was not regarded as applicable, although it must be admitted the record does not affirmatively show the non-presentation of the matter to the Treasury officials. But, in my judgment, the sections have no application to this case. The defendants are not seeking a claim or credit against the government, and the provision applies to such a case, while here the question is as to how much the government has been damaged, and when it is shown that, in any event, it has in fact received $1,182 of the $25,000 it claimed, it seems to me that, upon any basis of liability, such fact reduces the claim on the part of the government, not by reason of a credit, but because the defendant never was liable to the extent claimed, and in proving the facts which show there never was any such liability, it cannot, as it seems to me, be said that the defendants thereby claim a credit. They claim no

such thing, but they do claim, first, that the government has failed to prove a cause of action for any more than a nominal sum; or, second, for any greater sum than $23,818, being the difference between $25,000 and the $1,182 already received, and this is the extent of the cause of action proved by the government, after all the facts are in evidence.

The recovery in this case was not for the whole penalty of the bond, which was $100,000, but judgment was prayed for and recovered to the extent of $25,000, the whole amount of the notes, not deducting the $1,182 already received by the government. This shows that the recovery was at least based upon the amount of the damage and not upon the penalty, and it therefore further shows that it was indemnity, pure and simple, which the government claimed. Therefore it was necessary for it to prove the damage, and in proving the defense at least as to $1,182, the defendants were not proving a credit, but disproving to that extent the cause of action of the plaintiff.

For the reasons thus stated, I am in favor of reversing the judgment of the court below, and I dissent from the opinion of this court directing an affirmance.

I am authorized to state that Mr. Justice SHIRAS concurs in this dissent.

True copy.

Test:

Clerk Supreme Court, U. S.